Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

LOIS DELONG,

Petitioner,

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

John Fredericks, III
Counsel of Record
FREDERICKS, PELCYGER &
HESTER, LLC
1075 South Boulder Road
Suite 305
Louisville, CO 80027
(303) 673-9600
Attorneys for Petitioner

CURRY & TAYLOR • (202) 393-4141 • HTTP://USSCINFO.COM

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QUESTIONS PRESENTED

1. Does Section 408 of the Indian Child Protection and Family Violence Prevention Act (25 U.S.C. §3207(a)-(b)), on its face or as applied, deprive covered federal employees of liberty and/or property without due process of law because it employs an irrebuttable presumption that a federal employee convicted of a past crime is unfit to work around children, and must therefore be removed from federal service?

2. Is Section 3207 (a)-(b), on its face or as applied, an unconstitutional Bill of Attainder or *Ex Post Facto* law because it mandates the termination of a tenured federal employee s employment based solely on one past criminal conviction, which occurred some sixteen years before §3207(a)-(b) was enacted?

3. May Section 3207(a)-(b) be applied retroactively to Petitioner's conduct, which occurred some sixteen years before the Act was passed, when the result is the termination of government employment based solely on that past conduct?

4. If a statute is susceptible to an interpretation that will avoid a serious constitutional question, should a federal Agency and courts be required to interpret the statute in that manner?

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OPINIONS AND ORDERS BELOW

This matter began as an administrative appeal before the Merit Systems Protection Board ("Board"), filed by the Petitioner, Lois Delong, after her employment was terminated by the Indian Health Service, a Division of the Department of Health and Human Services ("Agency"). The Board's Initial Decision is contained in *Delong v. Dept. of Health & Human Services*, No. DE-0752-99-0299-I-1 (Merit Sys.Prot.Bd. Dec. 13, 1999). The Board's subsequent final decision is reported in *Johnson, et al. v. Dept. of Health & Human Services*, 86 M.S.P.R. 501 (Aug. 23, 2000). The court of appeals decision is reported in *Delong v. Dept. of Health & Human Services*, 264 F.3d 1334 (Fed.Cir. 2001). All three decisions are in the Appendix.

JURISDICTION

The court of appeals' judgment affirming the Board's adverse decision was entered on September 5, 2001. The court of appeals denied Delong's Petition for Rehearing on December 21, 2001. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the Constitution provides in relevant part that "No person shall be . . . deprived of life, liberty, or property, without due process of law."

2. Article I, Section 9, Clause 3 of the Constitution provides that "No Bill of Attainder or *Ex Post Facto* law shall be passed [by Congress]."

3. Section 408 (a)-(b) of the Indian Child Protection and Family Violence Prevention Act (25 U.S.C. §3207(a)-(b)), prior to its amendment in 2000, provided as follows:

Character investigations

(a) By Secretary of the Interior and the Secretary of Health and Human Services

The Secretary and the Secretary of Health and Human Services shall –

(1) compile a list of all authorized positions within their respective departments the duties and responsibilities of which involve regular contact with, or control over, Indian children,

(2) conduct an investigation of the character of each individual who is employed, or is being considered for employment, by the respective Secretary in a position listed pursuant to paragraph (1), and

(3) prescribe by regulations minimum standards of character that each of such individuals must meet to be appointed to such positions.

(b) Criminal records

The minimum standards of character that are to be prescribed under this section shall ensure that none of the individuals appointed to positions described in subsection (a) of this section have been found guilty of, or entered a plea of *nolo contendere* or guilty to, any offense under federal, state, or tribal law involving crimes of violence, sexual assault, molestation, exploitation, contact or prostitution; or crimes against persons.

STATEMENT OF THE CASE

Lois Delong is a Native American woman who was employed by the Indian Health Service as a substance abuse counselor. Part of her job included counseling Indian children. After having faithfully served in that capacity for over ten years, the Agency terminated Delong's employment

based solely on a twenty-five year old conviction for assault. Delong's assault conviction stemmed from a fight in which Delong was involved among Indian and non-Indian students at the University of South Dakota in 1974, while Delong was a student there. Delong pled guilty and served her sentence and has had no legal problems since her college years. Delong also disclosed the conviction at the time she applied for employment with the Agency, and was told that it was not a problem. Thus, as the court of appeals noted, Delong's removal was "not based on any alleged misconduct or poor performance" as a federal employee, *Delong*, 265 F.3d at 1337. Instead, the Agency felt compelled to terminate Delong's employment because it believed the provisions of 25 U.S.C. §3207(a)-(b) required it.

The Agency first proposed terminating Delong's employment in a letter dated April 19, 1999, contending that the 1974 assault conviction required her removal under §3207. Delong responded in writing to the proposed termination on April 26, 1999. In her response, Delong submitted extensive evidence from the Native American community whom the Agency serves which overwhelmingly supported her continued employment, and which praised her efforts in helping Native children and the community. Testimonials from Delong's former colleagues and supervisors described at length her vigorous commitment to and advocacy on behalf of the community in which she worked. The Agency did not dispute that, as a substance abuse counselor, Delong had garnered the trust, respect and admiration of high-risk Indian youth. She had created and implemented special substance abuse prevention activities for various Indian communities in New Mexico, devoting countless hours of her personal time after work and on weekends to serving those in need. Several letters submitted on her behalf noted that the termination of Delong's employment would constitute a significant loss to both the Native community and the Agency itself. There was no evidence that Delong actually posed any threat to the Native American children she worked with. In fact, the evidence

showed that Delong actually benefited and helped the children who came under her charge.

The Agency refused to even consider the evidence Delong submitted to refute the charge that she posed a threat to Native American children because of the old assault conviction. Instead, the Agency terminated Delong's employment on June 4, 1999, contending that §3207 mandated per se her removal because of the past conviction, regardless of any other evidence or mitigating circumstances.

Delong filed a timely appeal with the Board on December 13, 1999. An Administrative Law Judge ("AJ") reversed the Agency's action. *Delong v. Dept. of Health & Human Services*, No. DE-0752-99-0299-I-1 (Merit Sys.Prot.Bd. Dec. 13, 1999)("Initial Decision")(Appendix, p. 30a). The AJ noted that Delong did not dispute that her position was covered by the Act or that her assault conviction violated the minimum standards of character set forth in the Act. *Id.*, slip op. at 4. However, the AJ found that there was no language in §3207(a) or (b) which expressly mandated the removal of a covered federal employee, or which prohibited the Agency from "considering extenuating and mitigating circumstances in weighing the appropriateness of a disciplinary penalty." *Id.* at 4. The AJ ruled that while Congress intended to bar new appointments of individuals convicted of the covered offenses, the statute could still be construed "as suitability legislation which is solely prospective in nature" and that "there is an easily drawn distinction to be made between mere applicants for positions and current employees who possess tenure and status." *Slip op.* at 5, n.2. The AJ reasoned, "if Congress had intended that all current Federal employees possessing convictions for such offenses were to be removed, it would have undoubtedly enacted legislation stating just that." *Id.* at 5. As concerned Delong's case in particular, the AJ found that "the Agency erred in applying its per se removal rule to [Delong], a current employee with a single assault conviction in the distant past. Furthermore, relying as the Agency did on its *per se* rule, it has presented no evidence whatsoever concerning the appellant's actual suitability or eligibility to work with Indian children. *Id.* The

AJ found that the Agency's failure to present such evidence was "most likely attributable to the fact that there is none." *Id.* Therefore, the AJ concluded because the Agency had not considered Ms. Delong's actual suitability for work with Indian children, her removal could not be sustained. *Id.* at 5.

The AJ then determined that HHS had failed to demonstrate that Delong's removal "promoted the efficiency of the service," as required by 5 U.S.C. §7513(a)(1994). Specifically, the AJ determined that the nature of Ms. Delong's crime, the fact that it occurred twenty-five years ago and stemmed from a campus fight between Indians and non-Indians, the evidence of Ms. Delong's rehabilitation, and her ten years of service without incident demonstrated that she did not pose a threat to Indian children. *Id.* at 6-7. The AJ therefore concluded that Ms. Delong's removal would not further the Act's purpose of protecting Indian children from abuse, and reversed HHS's removal of Delong. *Id.* at 7.

The Agency petitioned the full Board for review of the Initial Decision. The Board disagreed with the AJ's interpretation of the Act and reversed the Initial Decision. *Delong*, 86 M.S.P.B. 501 (Aug. 23, 2000). The Board rejected the distinction drawn in the Initial Decision between current and prospective employees, and interpreted the statute as mandating, without exception, the removal of current employees who are employed in a position covered by §3207(a) and were convicted of enumerated crimes, even those, like Delong, whose crime had occurred in the distant past. The Board believed that its construction of the statute was consistent with the Congressional findings set forth in 25 U.S.C. §3201, including the findings that "multiple incidents of sexual abuse of Indian children had been perpetrated by Federal employees" and that "Federal background investigations of Federal employees who care for Indian children had been deficient." *Id.* at 508 (citing 25 U.S.C. §3201(a)(1)(C), (D)). Because there was no question that Delong was employed in a position covered by §3207(a) or that she had been convicted of a crime enumerated in §3207(b), the Board concluded that HHS was required by

§3207 to remove her from her position. The Board also determined that Delong's removal promoted the efficiency of the service, as required by 5 U.S.C. §7513(a). *Id.* at 509. The Board reasoned that §3207 itself creates a presumption of nexus between an employee's past conviction and the employee's continued service in a position covered by the Act.

Delong appealed the Board's decision to the United States Court of Appeals for the Federal Circuit, which had jurisdiction under 28 U.S.C. §1295(a)(9). The court of appeals affirmed the Board's decision in its entirety. Delong's Petition for Rehearing was denied on December 21, 2001. The court of appeals agreed with the Board that §3207(a)-(b) left no room for interpretation, and that it constituted a *per se* bar to continued employment in a covered position. The court of appeals also rejected Delong's arguments that the Agency's interpretation of §3207(a)-(b) was unconstitutional and that the statute could not be applied retroactively to punish conduct which occurred prior to the statute's enactment.

ARGUMENT

I. Section 3207(b), on its Face or as Applied, Deprives Delong of Liberty and Property Without Due Process of Law Because it Employs an Irrebuttable Presumption that Delong is Unfit to Work Around Indian Children and Therefore Must Be Removed as a Federal Employee, Based Only On a Twenty-Five Year Old Misdemeanor Assault Conviction.

Section 3207(b), as interpreted by the Board and the court of appeals, employs an irrebuttable presumption that Delong's 1974 assault conviction rendered her a threat to Indian children and therefore mandated the termination of her employment, without regard to any other evidence which would show that Delong does not actually pose a threat to Indian children she works with, and regardless of the nature of Delong's crime, the time when it was committed, her

rehabilitation following the crime and other mitigating circumstances. The court of appeals accepted the Board's interpretation of §3207, and held that the irrebuttable presumption that Delong was unfit for continued employment did not deprive Delong of liberty or property without due process of law. *Delong*, 264 F.3d at 1341-1343. The court of appeals' decision directly conflicts with the decisions of two other federal Courts in the Ninth and Eleventh Circuits.

First, in *Peterson v. Dept. of Health & Human Services*, No. A98-0264-CV (D. Alaska Sept. 27, 2000), the United States District Court held that §3207(b) created an impermissible permanently irrebuttable presumption because it "assumes that any person convicted of any crime against a person, regardless of rehabilitation, the remoteness of the act, or other mitigating factors, is unfit to work in a position where that individual would have contact with or control over Indian children" when such a presumption is not necessarily or universally true. *Peterson, slip op.* at 18-19. *Peterson* held that §3207(b) thus deprived the federal employee of due process under a line of this Court's cases, beginning with *Stanley v. Illinois*, 405 U.S. 645 (1972). *Id.* at 17-18.

Second, in *Fewquay v. Page*, 682 F.Supp. 1195 (S.D.Fla. 1987), *aff'd*, 896 F.2d 558 (11th Cir. 1990)(Table), the Court held that a Florida statute nearly identical to §3207 deprived an employee of the State Health and Rehabilitative Service ("HRS") of procedural due process because the statute created an irrebuttable presumption that a person employed as a group treatment leader was unfit to work with children, simply because he had been convicted of robbery twice when he was nineteen years old. 682 F.Supp. at 1198-99. *Fewquay* noted that the Plaintiff received no hearing before or after his termination. "The only process he was given was a hearing which was limited to determining whether or not the Plaintiff had, in fact, been convicted of the two robberies. . . . " *Fewquay*, 682 F.Supp. at 1197. The Court also found it troubling that the statute "provides no

exceptions for those [state employees] who have good records . . . [and][i]t is a blanket exclusion for a group of people forever from positions of special trust or responsibility within HRS." *Id.* *Fewquay* ruled that the Florida statute created a disfavored irrebuttable presumption and rejected fundamental concepts germane to the justice system such as penitence, rehabilitation, and "motive to do well." *Id.*; *accord, In Re Adoption of Jonee*, 695 N.Y.S.2d 920 (N.Y. Fam. Ct. 1999)(Irrebuttable statutory presumption that children's aunt was unfit to raise them because of one guilty plea to manslaughter 21 years previously violated state and federal due process requirements).

Fewquay and *Peterson* follow from a long line of this Court's decisions striking down statutory irrebuttable presumptions on due process grounds. *See e.g., Bell v. Burson*, 402 U.S. 535 (1971)(Invalidating a Georgia statute providing that if an uninsured motorist was involved in an accident and could not post security for the amount of damages claimed, his driver's license must be suspended without any hearing on the question of fault or responsibility); *Turner v. Dept. of Employment Security*, 423 U.S. 44 (1975)(striking down statute that makes pregnant women ineligible for unemployment benefits from 12 weeks before until six weeks after the date of childbirth); *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974)(Striking down mandatory maternity leave rule which presumed that mothers were unfit to resume work); *Vlandis v. Kline*, 412 U.S. 441 (1973)(Striking down statutory presumption regarding student's residency on due process grounds); and *Stanley v. Illinois*, 405 U.S. 645 (1972)(Striking down a statutory presumption that all unmarried fathers are unqualified to raise their children).

The court of appeals' decision also directly conflicts with the Supreme Court of Pennsylvania's decision in *Commonwealth v. Clayton*, 684 A.2d 1060 (Pa. 1993). In *Clayton*, the Court held that a state law, which provided for the revocation of a person's driver license for a period of one year upon the occurrence of only a single epileptic seizure,

without the licensee having the opportunity to present medical evidence in an effort to establish actual fitness, violates due process. Citing to *Bell*, 402 U.S. at 542, *Clayton* noted that "[d]ue process requires not just any 'hearing' but an 'appropriate' hearing." Although the regulation provided for a *de novo* hearing at which the driver "could present evidence to rebut the fact that he had a seizure," the court ruled that:

> it cannot be gainsaid that any "meaningful" opportunity to be heard would here require that the licensee be permitted to present objections, not to the conclusion that he had suffered an epileptic seizure, but rather to the presumption of competency to drive. While [the driver] indeed had a forum in which to assert his claim that he was competent to drive, that forum was rendered meaningless as a result of the irrebuttable presumption of [the regulation] since under that regulation, the recall of Appellee's license was a foregone conclusion. Such a meaningless hearing certainly does not comport with even the minimal standards afforded under due process.

Clayton, 630 A.2d at 1065.

The court added that since competency to drive was "the paramount factor behind the . . . regulations, any hearing which eliminates consideration of that very factor is violative of due process." *Id.*

This Court's cases, relied on in *Fewquay*, *Peterson* and *Clayton*, embody the general rule that, in cases where individual liberty or property interests are implicated, state concerns for administrative convenience and efficiency are not sufficient to deny an individualized hearing. In *Bell*, the Court stated that "since the statutory scheme makes liability an important factor in the State's determination to deprive an

individual of his license, the State may not, consistently with due process, eliminate consideration of that factor in its . . . hearing." *Bell*, 402 U.S. at 541. Significantly, the Court noted that "continued possession [of a license] may be essential in the pursuit of a livelihood" and "thus involves state action that adjudicates important interests of the licensees." *Id.* at 539. Accordingly, the Court ruled that the "additional expense occasioned by [an] expanded hearing [is] not sufficient to withstand" the constitutional requirement of due process. *Id.* at 540. In *Stanley*, the Court stated that even given proper state ends, "the Constitution recognizes higher values than speed and efficiency." *See Stanley*, 405 U.S. at 656. The Court relied on this proposition in *LaFleur*, 414 U.S. at 646-647 and *Vlandis*, 412 U.S. at 451. In *Vlandis*, the Court expressly ruled that:

> The State's interest in administrative ease and certainty cannot, in and of itself, save the conclusive presumption from invalidity under the Due Process Clause where there are other reasonable and practicable means of establishing the pertinent facts on which the State's objective is premised.

Vlandis, 412 U.S. at 451.

Fewquay, *Peterson*, and *Clayton* all correctly interpreted the Court's cases striking down similar statutory irrebuttable presumptions. The court of appeals' contrary decision requires this Court to intervene and resolve the conflict.

The court of appeals' decision also conflicts with this Court's own decisions striking down irrebuttable presumptions. The court of appeals determined that Delong's due process rights were controlled by this Court's analysis in *Weinberger v. Salfi*, 422 U.S. 749 (1975). In essence, the court of appeals held that under *Salfi*, a statute which creates an irrebuttable presumption does not deprive a person of liberty or property without due process of law as long as it

"does not abridge a fundamental right or discriminate against a suspect class" and as long as the statute "bears a rational relation to a legitimate legislative goal and is free from invidious discrimination." 264 F.3d at 1341. Implicit in the court of appeals' interpretation of *Salfi* is the remarkable proposition that as long as it satisfies the foregoing standard, Congress may define and limit the process to which a person is due (i.e., limit the evidence which a person may present in defense of her liberty or property).

In other words, according to the court of appeals, even where a person has a recognized liberty or property interest, Congress can, with impunity, create an imprecise bright line rule and in essence terminate a contractual property right or liberty interest, as long as "Congress, its concern having been reasonably aroused by the possibility of an abuse which it legitimately desired to avoid, could rationally have concluded both that a particular limitation would protect against its occurrence, and that the expense and other difficulties of individual determination justified the inherent imprecision of a prophylactic rule." *Id.* at 1343, quoting *Salfi*, 422 U.S. at 777. The court of appeals' extension of *Salfi* brings it into direct conflict with this Courts' other decisions in *Bell*, *Stanley*, *Vlandis*, and their progeny, *supra*. The Petition should be granted to determine where the line between *Salfi* and this Court's other decisions invalidating irrebuttable presumptions should be drawn.

The court of appeals correctly concluded that Congress' creation of minimum standards of character for those who have regular contact with Indian children "is rationally related to the government's interest in protecting those children from abuse." *Id.* The court ran astray, however, when it determined that Congress could also legislatively determine that persons who have been convicted of certain enumerated crimes do not meet the minimum standards of character, and foreclose that person from presenting evidence to rebut the presumption that he in fact poses no threat to Indian children. That such a scheme

violates due process is precisely the point of *Vlandis*, *Stanley* and their progeny.

Congress' "prophylactic rule" under Delong's circumstances cannot be justified because, unlike *Salfi*, Congress is not attempting to create eligibility classifications for social security benefits which, by definition, involves millions of claimants applying for limited welfare benefits. In such cases Congress can, undoubtedly, make a substantive policy decision that "limited resources would not be well spent in making individual [eligibility] determinations." *Salfi*, 422 U.S. at 784. "The Constitution does not preclude such policy choices as a price for conducting programs for the distribution of social insurance benefits." *Id.*, *accord*, *Califano v. Boles*, 443 U.S. 282, 283-85 (1979). This is because "a non-contractual claim to receive funds from the public treasury enjoys no constitutionally protected status." *Id.* at 772. But the rationale underlying *Salfi* cannot support the court of appeals' decision in Delong's case. Congress' power to adopt irrebuttable presumptions based upon substantive policy determinations may not stand when important liberty or property interests are implicated and when the administrative burden imposed by individualized hearings is not so significant as to justify dispensing with procedural due process. That is the point of *Bell*, *Vlandis*, *Stanley*, and their progeny.

Nor has this Court ever sanctioned a statutory irrebuttable presumption, like §3207, simply because "given the difficulty of identifying employees who pose a threat to Indian children, the choice of a blanket rule is justified." *Delong*, 264 F.3d at 1343. At some point statutes which create irrebuttable presumptions run afoul of due process. This Court recognized these limits on Congress' authority when it distinguished the Social Security provision at issue in *Salfi* with the statutory irrebuttable presumption in *Vlandis*. "Unlike the statutory scheme in *Vlandis*, the Social Security Act does not purport to speak in terms of the bona fides of the parties to a marriage, but then make plainly relevant evidence of such bona fides inadmissible." *Salfi*, 422 U.S. at

772. Thus, *Salfi* limited *Vlandis* "to those situations in which a state purports to be concerned with domicile, but at the same time denies to one seeking to meet its test of domicile the opportunity to show factors clearly bearing on that issue." *Toll v. Moreno*, 441 U.S. 458, 459 (1979).

The court of appeals' interpretation of §3207 clearly conflicts with the foregoing analysis of *Vlandis* and cases like it. In enacting the Indian Child Protection and Family Violence Prevention Act, Congress was concerned with protecting Indian children from abuse by federal employees. The minimum standards of character under §3207 are aimed at reducing the incidence of sexual abuse of children by federal employees in Indian Country, 25 U.S.C. §3201(a)(1)(C)-(D), and ensuring, to the greatest extent possible, that persons who pose a threat to Indian children would not be employed in a position where they would have "regular contact with, or control over, Indian children." 25 U.S.C. §3207(a)(1). Thus, the Act clearly speaks in terms of protecting Indian children from employees who might sexually abuse them or who pose a threat to their safety. But the irrebuttable presumption created by §3207(b), that persons convicted of certain enumerated crimes are automatically labeled sexual predators or threats to Indian children without giving them the right to present evidence that they are not, runs afoul of *Vlandis* because it makes "plainly relevant evidence" that the person does not pose a threat to Indian children (despite the conviction) inadmissible. *Salfi*, 422 U.S. at 772. In such cases, the statute cannot be disposed of as a matter of substantive due process. To do so all but emasculates the holdings in *Vlandis*, *Stanley* and cases like them striking down irrebuttable presumptions on procedural due process grounds. The Court should grant the Petition to clarify the conflict created by the lower Court's decision and determine what, if anything, remains of *Vlandis* and its progeny.

The Court should also grant the Petition to resolve the important question of whether statutes, which create irrebuttable presumptions, should be adjudged under

principles of procedural or substantive due process, or both. The Court's previous decisions have not been clear on this issue, and lower courts have reached inconsistent conclusions as a result.[1] Indeed, this Court's plurality decision in *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) reflects a split in the Court, but nevertheless indicates that statutes like §3207 must be adjudged under procedural due process principles. Justice Scalia's plurality opinion indicates that irrebuttable presumptions in statutes should be adjudged under substantive due process principles, and that cases like *Stanley* and *Vlandis* "do not . . . rest upon *procedural* due process," 491 U.S. at 120 (emphasis original). Thus, Justice Scalia is of the opinion that:

> Our irrebuttable presumption cases must ultimately be analyzed as calling into question

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[1] *See e.g., Gurmankin v. Costanzo*, 556 F.2d 184, 187 (3d Cir. 1984)(school district policy denying blind persons opportunity to take qualifying teachers exam and demonstrate competency constituted unconstitutional irrebuttable presumption); *Matter of Jonee*, 181 Misc.2d 822, 828-29 (N.Y. Fam. Ct. 1999)(inability to prove fitness under statute automatically disqualifying convicts from adopting children rendered statute unconstitutional); *Matter of Corey*, 184 Misc.2d 437, 466 (N.Y. Fam. Ct. 1999)(same); *Commonwealth v. Clayton*, 684 A.2d 1060, 1065 (Pa. 1996)(driving regulation suspending licensees who had suffered epileptic seizures struck down as violative of procedural due process; hearing rendered meaningless by foregone conclusion that drivers were unfit); *Mahoney v. Byers*, 48 A.2d 600, 603 (Md. 1946)(horse trainer statute struck down as creating unconstitutional irrebuttable presumption since presumption "destroyed right of appellee to offer evidence to establish his innocence."). *Cf., Malmed v. Thornburgh*, 621 F.2d 565, 575, 578 (3d Cir. 1980)(court characterizes irrebuttable presumption doctrine as an "aspect of substantive due process" in upholding mandatory retirement statute as rationally related to legitimate legislative objectives), *cert. denied*, 449 U.S. 995 (1980); *Fogt v. Ohio State Racing Commission*, 210 N.E.2d 730, 733 (Ohio Ct. App. 1965)(court upheld horse trainer regulation as reasonable in light of regulation's purpose, the business to which it related and what it was designed to prevent); *Owens v. Louisiana State Racing Commission*, 466 So.2d 764, 767 (La. Ct. App. 1985)(court upholds horse trainer regulation on rational basis grounds; regulation deemed reasonably related to governmental interest); *Briley v. Louisiana State Racing Commission*, 410 So.2d 802, 805-06 (La. Ct. App. 1982)(same).

> not the adequacy of procedures but – like our cases involving classifications framed in other terms – the adequacy of the fit between the classification and the policy that the classification serves.

491 U.S. at 121 (citations and quotations omitted).

On the other hand, the dissent in *Michael H.* pointed out that "[f]ive Justices agree that the flaw inhering in a conclusive presumption that terminates a constitutionally protected interest without any hearing whatsoever is a *procedural* one." 491 U.S. at 136 (Brennan, J. dissenting)(emphasis original) citing 491 U.S. at 153 (White, J. dissenting), and 491 U.S. at 132 (Stevens, J. concurring).[2] Justice White's dissent was even more direct, stating emphatically that a statutory conclusive presumption deprives a potential parent of liberty without procedural due process when it refuses him the opportunity to rebut a presumption that he is not a child's natural parent because he was not living with or married to the child's mother at the time of conception. 491 U.S. at 160. In such cases, "[h]e has, most definitely . . . been denied any real opportunity to be heard . . . based on the conclusive presumption . . . . " *Id.* at 161. In Justice White's view, "[t]he emphasis of the Due Process Clause is on 'process'." *Id.* at 163 quoting *Moore v. East Cleveland*, 431 U.S. 494, 542 (1977)(White, J. dissenting); *accord*, *Mobile, J & K.C.R.. v. Turnipseed*, 219 U.S. 35, 43 (1910)(quoted *infra*, p. 22). The Court should grant the Petition to resolve this important question.[3]

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[2] The confusion engendered by the Courts' divergence of view on this issue may have contributed to the court of appeals' mischaracterization of the Petitioner's due process arguments as being violative of substantive due process only. Delong clearly argued, in her briefs at oral argument, and on her Petition for Rehearing, that the irrebuttable presumption in §3207(b) violated her *procedural* due process rights. One could not garner this conclusion from the court of appeals opinion, *see* 264 F.3d at 1341, but the argument was clearly made.

[3] Petitioner suggests that the key to harmonizing *Salfi*, which analyzes statutes creating classifications (or conclusive presumptions concerning eligibility) through the substantive due process lens, and *Stanley* and its

Without question, Delong had a property interest, not to mention a ten-year investment, in her government employment. *Delong*, 264 F.3d at 1341. She also had an important liberty interest at stake, the right to be free of the stigma of the 1974 assault conviction, a concept embodied in this nation's traditional regard for rehabilitation, penitence and the right to work in a chosen profession after a debt to society has been paid. *Fewquay*, *supra*, 682 F.Supp. at 1198-99; *see Morrisey v. Brewer*, 408 U.S. 471, 482-484 (1972)(discussing both parolee's interest in continued liberty and in becoming a responsible member of society, and society's interest in restoring parolees to a normal and useful life and treating parolees fairly in order to enhance the chance of rehabilitation); *United States v. Henderson*, 482 F.Supp. 234, 243-44 (D.N.J. 1979) (noting the inequity of allowing one's past criminal record to create obstacles to gainful employment despite ex-convicts showing of complete rehabilitation); *Doe I v. Otte*, 259 F.3d 979, 982 (9th Cir. 2001)(indicating that an ex-convict's interest in rehabilitation and overcoming the stigma of a past conviction is part of a fundamental liberty interest), *cert. granted*, ___ U.S. ___, 70 U.S.L.W. 3374, 3514 (2002). Congress may not deprive Delong

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progeny which focuses on whether an irrebuttable presumption deprives a person of procedural due process, is in the personal interest which the statute affects. In cases that involve social welfare legislation that seeks to distribute limited benefits to millions of people, i.e., a "noncontractual claim to receive funds from the public treasury," *Salfi* 422 U.S. at 771-72, the conclusive presumption as to a person's eligibility for the benefits is properly adjudged under substantive due process principles. On the other hand, where a statute, either on its face or as applied, employs an irrebuttable presumption to deprive a person of a contractual property right or an important liberty interest, then the focus should be on procedural due process, that is, whether the hearing is meaningful and whether the person should be accorded a fair opportunity to rebut the presumption which, if not rebutted with admissible evidence, would result in the extinguishments of his liberty or property. *Bell v. Burson*, 402 U.S. 535, 542 (1971); *Commonwealth of Pennsylvania*, *supra*, 684 A.2d at 1065. The court of appeals' reliance on *Salfi* to uphold the irrebuttable presumption that Delong poses a threat to Indian children based only on a twenty-five year old assault conviction, and which forecloses her right to present evidence that she in fact does not pose a threat, extends *Salfi* into a realm where it does not belong, and brings *Salfi* into direct conflict with this Court's other decisions striking down irrebuttable presumptions.

of these important interests through an irrebuttable presumption that brands her forever as a danger to children, without affording her a meaningful opportunity to rebut the presumed fact.

Finally, because the court of appeals upheld the constitutionality of §3207 regardless of how far into the distant past it reaches, the Petitioner submits that the severe retrospective effect of §3207 violates substantive due process. *See Eastern Enterprises v. Apfel*, 524 U.S. 498, 547-49 (1998)(Kennedy, J. concurring in the judgment and dissenting in part). The Court should grant the Petition to consider this important question.

II. The Court of Appeals' Interpretation of Section 3207(a)-(b) to Require the Termination of Government Employment, Based on an Assault Conviction which Occurred Some Sixteen Years Prior to the Statute's Passage, is Unconstitutional Under the *Ex Post Facto* and/or Bill of Attainder Clause.

The court of appeals held that §3207(b) applied retroactively to covered crimes that occurred prior to the passage of the Act, and required that Delong's employment be terminated based on her past act. 264 F.3d at 1339-41. This Court should grant the Petition to resolve the important question whether §3207(a)-(b), on its face or as interpreted, is an unconstitutional E*x Post Facto* law or Bill of Attainder, prohibited under Article I, Section 9, clause 3 of the Constitution.

The Constitution expresses concern with retroactive laws through several of its provisions, including the *Ex Post Facto* clause, *Eastern Enterprises*, *supra*, 524 U.S. at 533, and the Bill of Attainder clause, *Landraf v. U.S.I. Film Products*, 511 U.S. 244, 266 (1990). Every statute which "takes away or impairs the vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past, must be deemed retrospective,"

Landraf, 511 U.S. at 269 (citations and quotations omitted). Such laws are immediately suspect as being constitutionally infirm. *Id.*

"The mark of an *Ex Post Facto* law is the imposition of what can fairly be designated punishment for past acts." *Id.* at 281 quoting *DeVeau v. Braisted*, 363 U.S. 144, 160 (1960). In *Eastern Enterprises, supra*, the Court held that the provisions of 26 U.S.C. §9706(a)(3), part of the Coal Industry Retiree Health Benefit Act of 1992, violated the Constitution because of its severe imposition of retroactive liability on Eastern Enterprises. Although the plurality opined that the statute violated the Takings clause, in a concurring opinion, Justice Thomas expressed the view that a civil statute which imposed retroactive liability might more appropriately be judged under the *Ex Post Facto* clause, which "even more clearly reflects the principle that retrospective laws are, indeed, generally unjust." 524 U.S. at 538. Thus, in an appropriate case, a civil law that imposes retrospective liability and that passes muster under the Takings clause (and presumably the Due Process clause) might nevertheless be unconstitutional under the *Ex Post Facto* clause." *Id.* at 538-39. Delong respectfully submits that this is such a case. Section 3207, though a civil law, is clearly punitive in that it results in the termination of Delong's ten-year term of employment with the Agency, and its effect is clearly retrospective because the termination is based on conduct that occurred some sixteen years prior to the passage of §3207. The effect of §3207(b) is to inflict an additional punishment on Delong (termination of her government employment) for her past crime, a punitive measure that the law did not impose at the time of her conviction. The law "forbids the application of any new punitive measure to a crime already consummated." *California Dept. of Corrections v. Morales*, 514 U.S. 499, 505 (1995). Therefore, the Court should grant the Petition to determine whether, because of its punitive effect on tenured government employees and because of its severely retrospective reach to past crimes, §3207 violates the *Ex Post Facto* clause.

The Court should also grant the Petition to determine whether §3207, as interpreted by the court of appeals, is an unconstitutional Bill of Attainder. This Court has consistently held that statutes which impose permanent bars to employment constitute punishment for purposes of the Bill of Attainder clause. *Cummings v. Missouri*, 71 U.S. (4 Wall) 277, 320-22 (1866); *Ex Parte Garland*, 71 U.S. (4 Wall) 333 (1866); *U.S. v. Lovett*, 328 U.S. 303 (1946); *U.S. v. Brown*, 381 U.S. 437 (1965); *see Nixon v. Admin. of General Services*, 433 U.S. 425, 473, 474 (1977)(legislative enactments barring designated individuals or groups from participation in specified employments or vocations are impermissible under the Bill of Attainder clause); *see also Selective Service Sys. v. Minnesota PIRG*, 468 U.S. 841, 852 (1984)("In our own country, the list of punishments forbidden by the Bill of Attainder clause has expanded to include legislative bars to participation by individuals or groups in specific employments and professions").

In *U.S. v. Brown*, *supra*, the Court held that a statute that made it a crime for a member of the Communist Party to serve as an officer or employee of a labor union (with limited exceptions), was an unconstitutional Bill of Attainder. 31 U.S. at 439-40. The Court explained that "the Bill of Attainder clause was intended not as a narrow, technical . . . prohibition, but rather as an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function, or more simply, trial by legislature." *Id.* at 442. The Bill of Attainder clause "also reflected the Framers' belief that the Legislative Branch is not so well-suited as politically independent judges and juries to the task of ruling upon the blame-worthiness of, and levying appropriate punishment upon, specific persons." *Id.* at 445:

> Legislative Acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution . . . . This

> permanent proscription from any opportunity to serve the government is punishment, and of a most severe type.

at 448-49.

In *U.S. v. Lovett*, *supra*, the Court struck down as a Bill or Attainder a statute labeling three named individuals as subversive, and effectively barring them from government employment forever, because Congress deemed them guilty of subversive activities and therefore unfit to hold a federal job. 339 U.S. at 313-14; *see Brown*, 381 U.S. at 460-61 (discussing *Lovett*). Similar statutes were struck down in *Cummings* (post-civil war law that barred persons from various professions unless they swore an oath that they had never served the Confederacy), and *Garland* (striking down similar oath requirement for practice of law).

In both *Cummings* and *Garland*, *supra*, the persons in the group disqualified were defined entirely by past acts which they could not reverse. Like the laws at issue in the foregoing cases, §3207(b), as interpreted by the court of appeals, singles out a group of people (those convicted of enumerated past crimes) and condemns them forever as being unfit for federal employment. The result in Delong's case is particularly harsh because Congress condemned her and brought about the termination of her employment after she had faithfully served Indian children as a substance abuse counselor for over ten years, a condemnation that was based only on a twenty-five year old misdemeanor assault conviction, an act only remotely related, if at all, to her actual fitness to work as a substance abuse counselor around children. Such an act constitutes a Bill of Attainder whether the condemned person "is called by name or described in terms of conduct which, because it is past conduct, operates only as a designation of particular persons. When past activity serves as a point of reference for the ascertainment of particular persons ineluctably designated by the legislature for punishment, the Act may be an attainder." *Selective Service System*, 468 U.S. at 847 (1984) quoting *Communist*

Party of U.S. v. Subversive Activities Control Bd., 367 U.S. 1, 86, 87 (1961), citing *Cummings*, (4 Wall) at 324.

Section 3207(b) is no different in its application than the statutes held invalid in *Lovett* and *Brown*, *supra*. What the Court said in *Brown* is particularly applicable here:

> We do not hold today that Congress cannot weed dangerous persons out of the labor movement, any more than this court held in *Lovett*, that subversives must be permitted to hold sensitive government positions. Rather, we make again the point made in *Lovett*: that Congress must accomplish such results by rules of general applicability. It cannot specify the people upon whom the sanction it prescribes is to be levied. Under our Constitution, Congress possesses full legislative authority, but the task of adjudication must be left to other tribunals.

381 U.S. at 461.

The Court's ruling in this regard is related to the principles underlying procedural due process and a historic disdain for congressionally created irrebuttable presumptions, which operate to deprive one of government employment or a protected property or liberty interest without a fair trial:

> We deal here with the reputation of men and their right to work—things more precious than property itself. We have here a system where a government with all its power and authority condemns a man to a suspect class and the outer darkness without the rudiments of a fair trial. . . It deprives men of "liberty" within the meaning of the Fifth Amendment, for one of man's most precious liberties is his right to work. When a man is deprived of that "liberty"

> without a fair trial, he is denied due process. If he were condemned by Congress and made ineligible for government employment, he would suffer a bill of attainder, outlawed by the Constitution.

Peters v. Hobby, 349 U.S. 331, 351-52 (1955)(Douglass, J. concurring).

The principles underlying the constitutional prohibition of Bills of Attainder as regards irrebuttable statutory presumptions are intimately related to principles of due process of law and the separation of powers. Legislative presumptions go too far when they intrude upon the evidentiary process, and thereby deprive individuals of their right not only to a fair adjudication, but the right also to disprove the stigma that the legislature has, for whatever reason, placed on them. In this regard, the Bill of Attainder clause and the due process clause are aimed at the same evil:

> [A] legislative presumption of one fact from evidence of another may not constitute a denial of due process of law or a denial of the equal protection of the law, it is only essential that there be some sort of rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate. So, also, it must not, under guise of regulating the presentation of evidence, operate to preclude the party from the right to present his defense to the main fact thus presumed.

Mobile, J & K.C.R. v. Turnipseed, 219 U.S. 35, 43 (1910)(emphasis added).

The Court should grant the Petition to resolve the important constitutional question, whether §3207(a)-(b), as

interpreted by the court of appeals and as applied to Petitioner Delong, is an unconstitutional Bill of Attainder.

III. The Court of Appeals' Holding that Section 3207(b) Applies Retrospectively to Convictions Which Occurred Prior to the Enactment of the Statute Conflicts with the Decisions of this Court Governing the Retroactivity of Statutes and Requiring that Statutes be Interpreted to Avoid Constitutional Problems.

The court of appeals held that the "plain language" of §3207 reaches an employee's conduct prior to the statute's enactment, and mandates the removal of a covered federal employee who has been convicted of an enumerated crime, regardless of how distant in the past the conviction occurred. 264 F.3d at 1339. The court of appeals believed that its interpretation was mandated by the plain language of §3207(a)-(b) despite the fact that there is no language mandating the removal of tenured federal employees whose conviction occurred long before the Act's passage.

The language of §3207 is not plain and unambiguous as the court of appeals believed, and this is best illustrated by the fact that Administrative Law Judges in four separate employee appeals to the Board (including Delong), interpreted §3207 contrary to the court of appeals, finding "that the plain language of the Act did not mandate the removals." *Johnson, et al. v. Dept. of Health and Human Services*, 86 M.S.P.B. 501, 504-05 (Aug. 23, 2000) (emphasis added). The AJ's decision in Delong reflected his reluctance to apply §3207 retroactively absent a more specific directive from Congress, as well as his belief that §3207 should be construed harmoniously with 5 U.S.C. §7513(a) which requires that the Agency's termination of Delong's employment be "for such cause as will promote the efficiency of the service." (Text *supra*, pp. 4-5). Certiorari should be granted because the court of appeals' contrary interpretation conflicts with the decisions of this Court governing the

retroactivity of statutes and requiring that statutes be interpreted to avoid serious constitutional problems.

The cases discussed in Section II, *supra*, illustrate a centuries old "singular distrust of retroactive statutes." *Eastern Enterprises*, *supra*, 524 U.S. at 547 (Kennedy, J. concurring in the judgment and dissenting in part). The presumption that laws may not apply retroactively is grounded in principles of fairness, and finds expression in several provisions of the Constitution. "[T]he principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal." *Landgraf*, *supra*, 511 U.S. at 265, quoting *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 855 (1990) (Scalia, J. concurring).

Thus, as a general rule, a congressional statute applies only to conduct occurring after the passage of the statute. *See, e.g., Hughes Aircraft Co. v. U.S. ex rel. Schumacher*, 520 U.S. 939, 946 (1997)(time honored presumption against retroactive application exists unless Congress has manifested intent to contrary); *Landgraf*, 511 U.S. at 265 (1994)(there is a presumption against retroactive legislation deeply rooted in jurisprudence). This is because the retroactive application of a statute is at odds with inherent notions of fairness and justice and disturbs reasonable expectations. The "distance into the past" that a statute reaches to impose liability and the magnitude of that liability "raise substantial questions of fairness." *Eastern Enterprises*, 524 U.S. at 534 (O'Connor, J. plurality opinion). At some point, the degree of retroactive effect of a statute renders it unconstitutional. *Id.* at 548-49 (Kennedy, J. concurring in the judgment and dissenting in part).

This Court has noted that the largest category of cases in which it has applied the presumption against retroactivity involve "new provisions affecting contractual or property rights, matters in which predictability and stability are of prime importance." *Landgraf*, 511 U.S. at 271. The test, which the Court applies in such cases, is twofold. First, the

Court, determines if "Congress has expressly prescribed the statute's reach." *Id.* at 280. When there is no such express command in the statute, then:

> [T]he court must determine whether the new statute would have retroactive effect, i.e., whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.

Id. at 280.

The court of appeals failed to give §3207 the critical analysis that this Court demands when a statute's arguable effect is to reach conduct in the distant past. This Court should grant the Petition to determine whether §3207 must be applied retroactively to effectuate Congress' intent, or whether it is susceptible to a reasonable interpretation that would avoid such a severe retroactive effect, and thereby avoid the constitutional infirmity inherent in statutes of this type. *See Eastern Enterprises, supra.*

There is no clear congressional intent, either in §3207 or any other provision of the Indian Child Protection and Family Violence Prevention Act, that requires, *per se*, the removal of federal employees based on covered crimes that were committed prior to the Act's passage. The AJ believed this to be the case and found no express language mandating the removal of Delong based on the 1974 conviction. Petitioner Delong submits that §3407 is susceptible to a reasonable interpretation alternative to the one given by the court of appeals, and that is the interpretation given by the AJ in this case (text *supra*, pp. 4-5). Section 3207 can reasonably be interpreted to employ a rebuttable presumption that tenured employees convicted of past crimes are unfit to work

around Indian children. *See In Re J.A. v. Rosado*, 736 N.E.2d 678 (Ill. App. Ct. 2000). Such an interpretation would be consistent with Congress' intent to protect children from abuse because it would require covered employees convicted of past crimes to come forward with evidence to rebut the presumption that they pose a threat to Indian children because of their past crime. At the same time, it would remove the constitutional and retroactivity concerns inherent in the court of appeals' analysis, because it would afford affected employees the right to rebut the legislative change that they pose a threat to the safety and well being of Indian children. "When faced with a statutory interpretation that would raise serious constitutional problems, the courts will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *U.S. West, Inc. v. F.C.C.*, 182 F.3d 1224, 1231 (10th Cir. 1999) quoting *Edward J. DeBantolo Corp. v. Fla. Gulf Coast Bldg & Construction Trades Council*, 485 U.S. 568, 575 (U.S. 1988). This Court should grant certiorari to determine whether §3407 is susceptible to a reasonable interpretation which would avoid the constitutional problems inherent in retroactive legislation, like this, which reaches far into a person's past to impose new liability for conduct which cannot be undone, and to avoid, if possible, "the unfortunate result" acknowledged by the court of appeals. *Delong*, 264 F.3d at 1343.

CONCLUSION

WHEREFORE, Petitioner, Lois Delong, respectfully requests that this Court GRANT her Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit.

Respectfully submitted this 21st Day of March 2002.

John Fredericks III
Fredericks, Pelcyger & Hester, LLC
1075 South Boulder Road, Suite 305
Louisville, CO 80027
TEL: (303) 673-9600
FAX: (303) 673-9155
Counsel for Petitioner

00-3449

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

LOIS DELONG,
Petitioner,

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES,
Respondent.

September 5, 2001, Decided

COUNSEL:
John Fredericks III, Fredericks, Pelcyger & Hester, LLC, of Louisville, Colorado, argued for petitioner.

Eric J. Nestor, Attorney, Commercial Litigation Branch, Civil Division, Department of Justice, of Washington, DC, argued for respondent. With him on the brief were Stuart E. Schiffer, Acting Assistant Attorney General; David M. Cohen, Director; and Harold D. Lester, Jr., Assistant Director.

JUDGES:
Before MAYER, Chief Judge, RADER, and SCHALL, Circuit Judges.

OPINION BY:
SCHALL

OPINION:

SCHALL, Circuit Judge.

Lois Delong petitions for review of the final decision of the Merit Systems Protection Board ("Board") that sustained her removal from her position with the Department of Health and Human Services ("HHS" or "agency") pursuant to *25 U.S.C. § 3207* (1994). Delong v. Dep't of Health & Human

Servs., No. DE-0752-99-0299-I-1 (Merit Sys. Prot. Bd. Aug. 23, 2000) ("Delong"). We affirm.

BACKGROUND

I.

Ms. Delong was employed as a Substance Abuse Specialist at the Acoma-Canoncito Laguna Service Unit of the Indian Health Service of HHS in San Fidel, New Mexico. The Indian Health Service provides health care services, including rehabilitative services, to American Indians and Alaska Native Indians. The Acoma-Canoncito Laguna Service Unit serves Indians in the Albuquerque, New Mexico area. Ms. Delong's position involved working with adolescents who were receiving treatment for chemical dependency, and she had regular and unsupervised contact with children.

On April 19, 1999, HHS issued a notice of proposed action to remove Ms. Delong from her position. The proposed removal was not based on any alleged misconduct or poor performance, but was initiated pursuant to the Indian Child Protection and Family Violence Prevention Act of 1990, codified at *25 U.S.C. § § 3201*-11 (1994) (the "Act").[1] Section 3207 of the Act sets minimum standards of character for federal employees whose positions involve regular contact with Indian children. HHS interpreted § 3207 as requiring it to remove Ms. Delong from her position because she had been arrested in 1974, when she was in college, on assault and battery charges and had pled guilty and been sentenced on those charges. In response to the proposed removal, Ms. Delong submitted a letter from her legal representative and several letters of character reference. Despite the evidence that Ms. Delong's job performance had been acceptable, HHS determined that she was not eligible for continued employment by operation of § 3207.[2] HHS therefore removed her from her position effective June 4, 1999.

II.

Ms. Delong appealed her removal to the Board. In an initial decision, the Administrative Judge ("AJ") to whom the case was assigned reversed HHS's action. Delong v. Dep't of Health & Human Servs., No. DE-0752-99-0299-I-1 (Merit Sys.

Prot. Bd. Dec. 13, 1999) ("Initial Decision"). The AJ noted that Ms. Delong did not dispute that her position was covered by the Act or that her assault and battery conviction violated the minimum standards of character set forth in the Act. Id., slip op. at 4. However, the AJ declined to interpret the Act as requiring HHS to remove current employees who have been convicted of enumerated crimes. Instead, the AJ read the statute as permitting HHS to "consider[] extenuating and mitigating circumstances in weighing the appropriateness of a disciplinary penalty" against a current employee, even though the statute "clearly bars new appointments . . . of individuals who have a criminal record that includes an enumerated offense." Id. Because HHS had not considered Ms. Delong's actual suitability for work with Indian children, the AJ determined that her removal should not be sustained. Id. at 5.

The AJ also determined that HHS had failed to demonstrate that Ms. Delong's removal "promoted the efficiency of the service," as required by *5 U.S.C. § 7513*(a) (1994). Specifically, the AJ determined that the nature of Ms. Delong's crime, the fact that it occurred twenty-five years ago and stemmed from a campus fight between Indians and non-Indians, the evidence of Ms. Delong's rehabilitation, and her ten years of service without incident demonstrated that she did not pose a threat to Indian children. Id. at 6-7. The AJ therefore concluded that Ms. Delong's removal would not further the Act's purpose of protecting Indian children from abuse. Id. at 7. Accordingly, the AJ reversed HHS's removal of Ms. Delong.

HHS petitioned the full Board for review of the Initial Decision. The Board disagreed with the AJ's interpretation of the Act and reversed the Initial Decision. Delong, slip op. at 2. The Board rejected the distinction drawn in the Initial Decision between current and prospective employees, and interpreted the statute as applying with equal force to individuals who are employed in a position covered by § 3207(a) and individuals who are being considered for employment in such a position. Id. at 7. The Board also determined that the statute does not permit HHS to retain a current employee who has been found to violate the

minimum standards of character set forth in § 3207(b). Id. at 8. The Board stated that its construction of the statute was consistent with the Congressional findings set forth in *25 U.S.C. § 3201*, including the findings that "multiple incidents of sexual abuse of Indian children had been perpetrated by Federal employees" and that "Federal background investigations of Federal employees who care for Indian children had been deficient." Id. at 9 (citing *25 U.S.C. § 3201*(a)(1)(C), (D)). Because there was no question that Ms. Delong was employed in a position covered by § 3207(a) or that she had been convicted of a crime enumerated in § 3207(b), the Board concluded that HHS was required by § 3207 to remove her from her position.

The Board also determined that Ms. Delong's removal promoted the efficiency of the service, as required by *5 U.S.C. § 7513*(a). Id. at 10. The Board reasoned that § 3207 creates a presumption of nexus between an employee's violation of the Act's minimum standards of character and the employee's continued service in a position covered by the Act. Id. Thus, the Board determined that the statute itself creates "'the necessary connection between the employee's off-duty misconduct and the employee's job-related responsibilities.'" Id. (quoting *White v. U.S. Postal Serv., 768 F.2d 334, 335-36 (Fed. Cir. 1985)).*

The Board also rejected Ms. Delong's arguments that the penalty of removal was unreasonable and should be mitigated. Id. at 11. The Board reiterated its determination that § 3207 "prohibits individuals from holding an appointment to a covered position if they have been found guilty of . . . a covered crime." Id. The Board also noted that HHS had shown that there were no other positions to which Ms. Delong could have been reassigned. Id. The Board therefore determined that HHS was justified in removing Ms. Delong. Id. Accordingly, it sustained the removal action. Id.

Ms. Delong petitions for review of the Board decision. We have jurisdiction pursuant to *28 U.S.C. § 1295*(a)(9) (1994).

DISCUSSION

I.

Our scope of review in an appeal from a decision of the Board is limited. We must affirm the decision unless we find it to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; obtained without procedures required by law, rule, or regulation having been followed; or unsupported by substantial evidence. *5 U.S.C. § 7703*(c) (1994). Ms. Delong challenges the Board's interpretation of § 3207. Her challenge raises a question of law, which we review de novo. See *Nebblett v. Office of Pers. Mgmt., 237 F.3d 1353, 1356 (Fed. Cir. 2001).*

Ms. Delong argues that the Board's interpretation of § 3207 is unconstitutional because it denies her the due process protections guaranteed by the Fifth Amendment to the United States Constitution. Specifically, she contends that the Board's interpretation violates her substantive due process rights by creating an impermissible irrebuttable presumption that she is unfit for continued employment because of her past conviction. Ms. Delong argues that the Board erred in interpreting § 3207 as applying to current employees whose criminal conduct occurred prior to the effective date of the Act because the statute does not contain clear language demonstrating that Congress intended the Act to have retroactive effect. She also argues that the statute should be interpreted as requiring HHS to conduct an individualized hearing to consider mitigating circumstances when a current employee is found to violate the minimum standards of character in the Act.

In response, HHS argues that the Board's interpretation of § 3207 accords with the plain language of the Act. HHS asserts that the statute itself requires it to investigate the character of current employees and to ensure that all employees in covered positions meet the minimum standards of character. With respect to Ms. Delong's substantive due process argument, HHS argues that the Act's minimum standards of character bear a rational relationship to a legitimate government purpose--protecting Indian children from abuse by federal employees. Therefore, HHS contends,

the Act does not violate Ms. Delong's substantive due process rights.

For the reasons set forth below, we agree with HHS that the plain language of § 3207 requires that the agency apply the Act's minimum standards of character to current employees and that the agency remove from positions covered by the Act any employees who fail to meet those standards. We also agree with HHS that this interpretation of § 3207 does not render the Act unconstitutional under the Due Process Clause of the Fifth Amendment.

II.

When determining the meaning of a statute, we look first to the language of the statute itself. *Van Wersch v. Dept. of Health & Human Servs., 197 F.3d 1144, 1148 (Fed. Cir. 1999).* "If the language is clear, the plain meaning of the statute will be regarded as conclusive." Id.

Section 3207, as in effect at the time of Ms. Delong's removal, provided in relevant part as follows:

> § 3207. Character Investigations
>
> (a) By Secretary of the Interior and the Secretary of Health and Human Services
>
> The Secretary [of the Interior] and the Secretary of Health and Human Services shall-
>
> (1) compile a list of all authorized positions within their respective departments the duties and responsibilities of which involve regular contact with, or control over, Indian children,
>
> (2) conduct an investigation of the character of each individual who is employed, or is being considered for employment, by the respective Secretary in a position listed pursuant to paragraph (1), and

> (3) prescribe by regulations minimum standards of character that each of such individuals must meet to be appointed to such positions.
>
> (b) Criminal records
>
> The minimum standards of character that are to be prescribed under this section shall ensure that none of the individuals appointed to positions described in subsection (a) of this section have been found guilty of, or entered a plea of nolo contendere or guilty to, any offense under Federal, State, or tribal law involving crimes of violence; sexual assault, molestation, exploitation, contact or prostitution; or crimes against persons.

25 U.S.C. § 3207 (emphases added). The plain language of the statute demonstrates that it applies to current employees. Section 3207(a)(2) requires HHS to "conduct an investigation of each individual who is employed . . . in a [covered] position." Id. Section 3207(a)(3) requires HHS to "prescribe by regulations minimum standards of character that each of such individuals must meet to be appointed to such positions," and § 3207(b) requires the minimum standards to "ensure that none of the individuals appointed to [covered] positions . . . have been found guilty of, or entered a plea of nolo contendere or guilty to, any [enumerated crime]." Id.

Ms. Delong argues that the "to be appointed to" language of § 3207(a)(3) and § 3207(b) indicates that the minimum standards of character apply to prospective employees only. However, current employees also may be considered to "be appointed" to their positions. Moreover, the term "such individuals" in § 3207(a)(3) refers back to the phrase "each individual who is employed, or is being considered for employment" in preceding subsection § 3207(a)(2).

The plain language of § 3207 also makes it clear that enumerated crimes committed prior to its enactment violate

the minimum standards of character. Section 3207(a) requires the agency to investigate the character of current employees. Such investigation would not be necessary if an employee's past conduct were irrelevant to whether that employee meets the minimum standards of character required by the Act. Moreover, § 3207(b) requires the agency to "ensure that none of the individuals appointed to [covered] positions . . . have been found guilty of . . . [an enumerated crime]." (emphasis added). This language clearly requires HHS to consider crimes committed prior to enactment of the Act when determining whether an employee satisfies the minimum standards of character.

Our interpretation of § 3207 is reinforced by the findings and purposes behind the Act, which are set forth in § 3201. As noted by the Board, one of the findings behind the Act recognized that "multiple incidents of sexual abuse of children on Indian reservations have been . . . perpetrated by persons employed . . . by the Federal government." *25 U.S.C. § 3201*(a)(1)(C) (1990). That finding reflects Congress's concern that current federal employees may pose a threat to Indian children. Another finding recognized that "investigations of the background of Federal employees who care for . . . Indian children are often deficient." Id. § 3201(a)(1)(D). That finding suggests that Congress also was concerned that some current federal employees might not be fit for employment in positions covered by the Act due to their past criminal conduct. Interpreting § 3207 as applying to current employees and as requiring the consideration of past criminal conduct also furthers one of the "major goals" of the Act, "reduc[ing the] incidents . . . of abuse of children . . . in Indian country," Id. § 3201(a)(2).

Ms. Delong argues that § 3207 does not require HHS to remove current employees who fail to meet the minimum standards of character, but instead permits HHS to consider mitigating circumstances that might establish the employee's fitness for continued employment in a covered position, notwithstanding the employee's criminal record. We are unable to discern any language in § 3207 that supports Ms. Delong's construction of the statute. Section 3207(b) requires HHS to "ensure that none of the individuals appointed to

[covered] positions . . . have been found guilty of . . . [an enumerated crime]." The only way HHS can "ensure" that current employees meet the minimum standards of character is to remove employees who fail to meet the standards.

III.

Interpreting § 3207 as requiring HHS to remove current employees who violate the Act's minimum standards of character does not render the statute unconstitutional under the Due Process Clause of the Fifth Amendment. A federal employee, as defined in *5 U.S.C. § 7501* (1994), "has a property right in [her] continued employment." *King v. Alston, 75 F.3d 657, 661 (Fed. Cir. 1996)*. That property right entitles the employee to procedural due process protections under the Fifth Amendment. *King v. Erickson, 89 F.3d 1575, 1581 (Fed. Cir. 1996)*, rev'd on other grounds sub nom. *Lachance v. Erickson, 522 U.S. 262, 139 L. Ed. 2d 695, 118 S. Ct. 753 (1988)*. "When an agency brings charges against an employee, compliance with [the procedures of *5 U.S.C. § 7513*(b)] satisfies the minimum due process requirements to which the employee is entitled." Id. Ms. Delong does not argue that her procedural due process rights were violated, nor could she. HHS provided her with "at least 30 days' advance written notice . . . stating the reasons for the proposed action," afforded her "a reasonable time to answer orally and in writing and to furnish affidavits . . . in support of the answer," permitted her to be represented by an attorney, and provided her with "a written decision and the specific reasons therefore." *5 U.S.C. § 7513*(b). Instead, as noted, Ms. Delong argues that the statute violates her substantive due process rights by creating an irrebuttable presumption that, because of her criminal record, she is unfit for service in a covered position.

In order to evaluate the merits of this argument, we must determine what level of protection the Constitution provides to Ms. Delong's property interest in her federal employment. Ms. Delong asserts that her federal employment is a fundamental right and that, therefore, § 3207 is subject to strict scrutiny review. In response, HHS cites *Weinberger v. Salfi, 422 U.S. 749, 45 L. Ed. 2d 522, 95 S. Ct. 2457 (1975)*,

for the proposition that the statute need only be reviewed for a rational basis. Ms. Delong correctly points out that because Salfi is a "social welfare classification" case it is not directly on point with her appeal. However, that does not mean that we can ignore the Supreme Court's decision in Salfi altogether, particularly where that decision "explains . . . at some length" the Court's prior decisions on the constitutionality of irrebuttable presumptions. *Salfi, 422 U.S. at 768.* Salfi indicates that statutes creating conclusive presumptions are judged under the same due process standards as other statutes. *Id. at 770-72.* Where the statute at issue does not abridge a fundamental right or discriminate against a suspect class, it is upheld if it "bears . . . [a] rational relation to a legitimate legislative goal" and is free from invidious discrimination. *Id. at 772.*

Ms. Delong has not cited, and we could not uncover, any case where the Supreme Court has suggested that federal employment is a fundamental right, the abridgment of which must withstand strict scrutiny under the Due Process Clause. The closest case cited by Ms. Delong is *Cleveland Board of Education v. LaFleur, 414 U.S. 632, 39 L. Ed. 2d 52, 94 S. Ct. 791 (1974),* where the Court struck down a state law that required pregnant public school teachers to take unpaid leave beginning five months before their due dates. The Court reviewed the statute under a more critical lens than the rational basis test, requiring the state to "justify the particular procedures [it had] adopted" and to convince the Court that the chosen procedures "do not needlessly, arbitrarily, or capriciously impinge" on the teachers' rights. *Id. at 640.* The Court did not apply this heightened level of scrutiny because the teachers had a "fundamental" interest in their employment, however, but because "the decision whether to bear . . . a child" was viewed as a "basic constitutional liberty" upon which the statute infringed. *Id. at 640, 647; Salfi, 422 U.S. at 771* (noting that LaFleur concerned the important "freedom of personal choice in matters of marriage and family life"). Because Ms. Delong has not demonstrated that her federal employment is a fundamental right, and has not argued that the statute discriminates against her as a member

of a suspect class, we review § 3207 under the rational basis test.

Ms. Delong argues that the statute fails under the rational basis test because it is overly broad. She contends that removing employees who have been rehabilitated since committing their crimes, as she alleges she has been, does not further the legitimate purpose behind the Act of protecting Indian children from abuse. Ms. Delong asserts that, in order to pass muster under the Constitution, the statute must require HHS to conduct a meaningful hearing, based on individual circumstances, on the issue of whether an employee is fit for continued employment in a covered position. We have carefully considered Ms. Delong's arguments, but we cannot agree that the Constitution requires such a hearing in her case.

"The hearing required by the Due Process Clause must be meaningful and appropriate to the nature of the case." *Bell v. Burson, 402 U.S. 535, 541-42, 29 L. Ed. 2d 90, 91 S. Ct. 1586 (1971)* (internal quotations and citations omitted). A procedural rule required to satisfy due process in one context may not be required in every case. *Id. at 540.* For example, in Bell, the Supreme Court held that before Georgia could deprive an uninsured motorist involved in an accident of his driver's license and vehicle registration for failing to post security to cover the amount of damages claimed against him, it had to conduct a hearing to determine "whether there is a reasonable possibility" that he might be found at fault or otherwise liable for the damages. *Id. at 540.* The Court did not reach this conclusion because an irrebuttable presumption that uninsured drivers are at fault would be unconstitutional per se, but because other aspects of the statute at issue demonstrated that actual liability "played a crucial role in the . . . [law]." *Id. at 541.* For example, Georgia would not suspend the uninsured driver's license if the injured party released him from liability or if there was an adjudication of nonliability. Id. Relevant to Ms. Delong's appeal is the Court's statement that if "fault and liability [were] irrelevant to the statutory scheme," a hearing limited to the issues of whether the uninsured driver was involved in the accident, whether he had complied with the statute, and

whether he fell under any of the exceptions to the statute "would [have been] appropriate to the nature of the case." Id. (internal quotation omitted). Under those circumstances, a hearing on liability would not be required. Id. Section 3207 is similar to the "no-fault" scheme distinguished in Bell in that it prohibits the employment of any person who fails to satisfy certain minimum standards of character, regardless of whether the person actually poses a threat to Indian children. Bell therefore indicates that the Constitution does not require that Ms. Delong be afforded a hearing on the issue of her fitness for service in a covered position.

In creating the minimum standards of character set forth in § 3207, Congress created a bright line rule that anyone who has been convicted of an enumerated crime may not serve in a covered position. Like all bright line rules, § 3207 is both over-inclusive and under-inclusive, but the imprecision of the statute does not make it unconstitutional. The Supreme Court's analysis of the Social Security statute at issue in Salfi is instructive on this point. The statute denied survival benefits to "widows and stepchildren who had their respective relationships to a deceased wage earner for less than nine months prior to his death." *Salfi, 422 U.S. at 754.* The statute "was intended to prevent the use of sham marriages to secure Social Security payments." *Id. at 767.* The Court noted that, when a statute does not infringe upon a constitutionally protected status or a fundamental right, the Constitution does not "ban all prophylactic [over-inclusive and under-inclusive] provisions," and does not even require that "the provision filters out a substantial part of the class which caused congressional concern, or [that] it filters out more members of the class than nonmembers." *Id. at 777.* Instead, the Court stated, "the question is whether Congress, its concern having been reasonably aroused by the possibility of an abuse which it legitimately desired to avoid, could rationally have concluded both that a particular limitation . . . would protect against its occurrence, and that the expense and other difficulties of individual determination justified the inherent imprecision of a prophylactic rule." Id.

Ms. Delong admits that the creation of minimum standards of character for those who have regular contact

with Indian children is rationally related to the government's interest in protecting those children from abuse. Congress could rationally have concluded that the minimum standards of character in § 3207 would reduce the incidence of abuse of Indian children at the hands of federal employees. Moreover, given the difficulty of identifying employees who pose a threat to Indian children, the choice of a blanket rule is justified in this case. Cf. *Vlandis v. Kline, 412 U.S. 441, 452, 37 L. Ed. 2d 63, 93 S. Ct. 2230 (1973)* (striking a statute that denied students the resident rate for state university tuition and fees by operation of an irrebuttable presumption where the state had "reasonable alternative means of making the crucial [resident or nonresident] determination"); *LaFleur, 414 U.S. at 800 n.14* (noting that, instead of imposing an irrebuttable presumption that women are physically unfit to work as teachers after their fifth month of pregnancy, the school boards "could require the pregnant teacher to submit to a medical examination by a school board physician, or simply require each teacher to submit a current certification from her obstetrician as to her ability to continue work"); but see *Stanley v. Illinois, 405 U.S. 645, 652, 31 L. Ed. 2d 551, 92 S. Ct. 1208 (1972)* (stating that a father's "interest in retaining custody of his children is cognizable and substantial" and requiring a hearing on the issue of a father's parental fitness before his children can be removed from his custody).

CONCLUSION

Although § 3207 appears to work an unfortunate result in Ms. Delong's case, requiring her removal on the sole basis of an assault and battery conviction that is over twenty-five years old, we cannot say that HHS's application of the statute to Ms. Delong violated her due process rights. Therefore, the final decision of the Board sustaining HHS's removal of Ms. Delong from her position as a Substance Abuse Specialist is

AFFIRMED.

No costs.

Footnotes

[1] The Act was amended on December 27, 2000. Omnibus Indian Advancement Act of 2000, Pub. L. 106-568, 114 Stat. 2918; *25 U.S.C.A. § 3207* (West 2001). All references to the Act in this opinion are to the 1994 version of the law, which was in effect during the period relevant to this case.

[2] Prior to proposing her removal, HHS attempted to find another position for Ms. Delong at the Acoma-Canoncito Laguna Service Unit; however, it determined that all positions at the Service Unit were covered by the Act.

DOCKET NUMBERS DE-0752-99-0219-I-1, DA-0752-99-0315-I-1, DA-0752-99-0311-I-1, DE-0752-99-0299-I-1

MERIT SYSTEMS PROTECTION BOARD

ROGER V. JOHNSON, QUINTON E. CASE, PHILLIP G. DAUGHERTY, AND LOIS DELONG,
Appellants,

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES,
Agency.

August 23, 2000

Daniel Minahan, Esquire, Minahan & Shapiro, P.C., Lakewood, Colorado, for appellant Johnson; Nathan H. Young, III, Esquire, Tahlequah, Oklahoma, for appellant Case; Peachie Barton-Daugherty, Cookson, Oklahoma, for appellant Daugherty; John Fredericks III, Esquire, Louisville, Colorado, for appellant Delong.

James M. Cribari, Esquire, Denver, Colorado; Shara Michalka, Esquire, Dallas, Texas; Sandra Trent, Esquire, Dallas, Texas, for the agency.

OPINION BY: TAYLOR

OPINION:

BEFORE

Beth S. Slavet, Acting Chairman

Susanne T. Marshall, Member

OPINION AND ORDER

The agency petitions for review of the initial decisions that reversed its removal actions. Because these appeals involve similar facts and issues, we have CONSOLIDATED them for review. 5 C.F.R. § 1201.36(a)(1). For the reasons discussed below, we GRANT the agency's petitions, AFFIRM the initial decisions findings in connection with the appellants' failure to prove their affirmative defenses, REVERSE the initial decisions with respect to the administrative judges' findings regarding the statutory interpretation of *25 U.S.C. § 3207*, and SUSTAIN the removal actions.

BACKGROUND

The agency removed the appellants from their positions of employment based on violations of the minimum standards of character under the Indian Child Protection and Family Violence Prevention Act, Pub. L. No. 101-630, 1990 U.S.C.C.A.N. (104 Stat.) 4544, codified at *25 U.S.C. § 3207* (the "Act" or "statute"). As fully set forth in the analysis section of this decision, the Act requires the agency to "compile a list of all authorized positions . . . the duties and responsibilities of which involve regular contact with, or control over, Indian children . . ." ("covered position") and to "conduct an investigation of the character of each individual who is employed or is being considered for employment" in a covered position. *25 U.S.C. § 3207*(a). The statute states that "the minimum standards of character . . . shall ensure that none of the individuals appointed to [covered] positions . . . have been found guilty of, or entered a plea of nolo contendere, or guilty to, any offense under federal, state, or tribal law involving crimes of violence; sexual assault, molestation, exploitation, contact or prostitution, or crimes against persons" ("covered crimes"). *25 U.S.C. § 3207*(b).

The issue presented is whether the agency correctly interpreted the language of the Act as requiring the removal of the appellants from covered positions because they had been found guilty of, or had entered a plea of no contest or guilty to, covered crimes. This is a case of first impression for

the Board. We have set forth below the individual facts of each case.

Johnson was employed as a Clinical Nurse, GS-9, at the agency's Indian Health Center in Pine Ridge South Dakota. Johnson Initial Appeal File 1 DE-0752-99-0219-I-1 (IAF1), Tab 1 and Tab 12, Subtab 4K at 20. Case was employed as a Medical Technician, GS-0645-04, and Daugherty was employed as a Clinical Nurse, GS-0610-09, both by the Oklahoma City Area Indian Health in the W.W. Hastings Indian Hospital in Tahlequah, Oklahoma. Case Initial Appeal File 2 DA-0752-99-315-I-1 (IAF2), Tab 1 and Daugherty Initial Appeal File 3 DA-0752-99-0311-I-1 (IAF3), Tab 1. Delong was employed as a Substance Abuse Specialist at the Aconma-Caoncito-Lauguna Service Unit, San Fidel, New Mexico. Delong Initial Appeal File 4 DE-0752-99-299-I-1 (IAF4). The agency classified the appellants' positions as covered positions under the Act.

As the result of background investigations required by the Act, the agency discovered that each appellant had been convicted of, or pled guilty or no contest to a crime against persons. In 1999, Johnson pled no contest to the charge of attempted terroristic threats.[1] IAF1, Tab 12, Subtab 4F. In 1992 and 1996, Case pled guilty to two charges of assault and battery. IAF2, Tab 6, Subtab 4e. While Daugherty was serving in the Marine Corps in 1983, he was convicted by a special military court martial of indecent assault with intent to gratify his lust and/or sexual desires. IAF3, Tab 7, Subtab 4d. In 1974, Delong was convicted of assault and battery. IAF4, Tab 6, Subtab 4i.

Prior to proposing their removals and as required by the Act, *25 U.S.C. § 3207*(b), the agency searched for available vacant positions to which the appellants could have been reassigned; however, no such positions were available that did not have contact with Indian children. Consequently, the agency removed Johnson for failure to meet the suitability requirements of a clinical nurse who has regular contact with Indian children. IAF1, Tab 12, Subtab 4C. In separate actions, the agency removed Case and Daugherty for: (1) loss of qualifications and ineligibility to perform the duties of the

position; and (2) falsification of the application for Federal employment.[2] IAF2, Tab 6, Subtab 4e; IAF3, Tab 7, Subtab 4d. Delong was removed for her loss of eligibility to perform the duties of the position for which she was hired. The appellants filed separate appeals.

Although the administrative judges issued separate initial decisions, they used the same rationale to reverse the agency's removal actions. Basically, they found that the plain language of the Act did not mandate the removals. Johnson Initial Decision 1 (ID1), IAF1, Tab 24; Case Initial Decision (ID2), IAF2, Tab 20; Daugherty Initial Decision (ID3), IAF3, Tab 17; and Delong Initial Decision (ID4), IAF4, Tab 23.[3] In finding that the removals were not sustainable, the administrative judges relied on regulations issued in accordance with the Act by the Bureau of Indian Affairs (BIA), the agency's sister agency. The BIA regulations authorized the agency to consider mitigating circumstances in determining whether an employee should be terminated based on a violation of the minimum standards of character. *Id.*

The agency filed timely petitions for review arguing that the administrative judges erroneously interpreted section 3207 of the Act. Johnson Petition for Review File 1 DE-0752-99-0219-I-1 (PFRF1), Tab 2; Case Petition for Review File 2 DA-0752-99-0315-I-1 (PFRF2); Daugherty Petition for Review File 3 DA-0752-99-0311-I-1 (PFRF3); and Delong Petition for Review File 4 DE-0752-99-0299-I-1 (PFRF4). Additionally, the agency requested that the Board take judicial notice of the BIA's regulatory amendment, which revised the regulations to state that "an employer *must* deny employment or dismiss any employee when he has been found guilty of or entered a plea of guilty or nolo contendere" to a covered crime. *64 Fed. Reg. 66,770, 66,771 (1999)* (to be codified at 25 C.F.R. § 63.19.[4] In their separately filed responses, the appellants argue that the administrative judges correctly interpreted the statute based on the version of the regulation in effect at the time of the removals and that the amendment does not mandate the reversal of the initial decisions because it cannot be applied retroactively in these cases.[5]

ANALYSIS

The agency argues that the administrative judges' interpretation of *25 U.S.C. § 3207* is erroneous as a matter of law because it is contrary to the plain meaning of the language in the statute. For the reasons discussed below, we find that the administrative judges erred by relying on the BIA regulations and finding that the adjudicating agency official has discretion to consider mitigating factors when determining whether an employee should be removed based on a violation of the minimum standard of character under the Act.

The starting point of every case involving statutory construction must be the language of the statute itself. *Todd v. Department of Defense, 63 M.S.P.R. 4, 7 (1994), aff'd, 55 F.3d 1574 (Fed. Cir. 1995).* In *Chevron, U.S.A. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842 (1984),* the Supreme Court provided the framework under which a court is to review an agency's construction of a statute that it administers. Consistent with *Chevron,* the Board must follow a two-step process in its review. The first step is to determine whether Congress has spoken directly to the issue through the language of the statute. *Id.* "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* The Board reaches the second step only if it finds that Congress did not directly address the issue in question and the statute is silent or ambiguous with respect to the specific issue. The second step is to determine whether the agency's interpretation is based on a permissible construction of the statute. *Id. at 843.* If the construction is permissible, the reviewing authority should defer to the agency's interpretation. We conclude that the initial decisions improperly reversed the mandated order of *Chevron* analysis.

In applying *Chevron,* we must first look at the applicable language of the statute. The pertinent portion of the statutory language is as follows:

§ 3207. Character investigations

(a) By Secretary of the Interior and the Secretary of Health and Human Services

The Secretary and the Secretary of Health and Human Services shall -

(1) compile a list of all authorized positions within their respective departments the duties and responsibilities of which involve regular contact with, or control over, Indian children.

(2) conduct an investigation of the character of each individual who is employed, or is being considered for employment, by the respective Secretary in a position listed pursuant to paragraph (1), and

(3) prescribe by regulations minimum standards of character that each of such individuals must meet to be appointed to such positions.

(b) Criminal records

The minimum standards of character that are to be prescribed under this section shall ensure that none of the individuals appointed to positions described in subsection (a) of this section have been found guilty of, or entered a plea of nolo contendere or guilty to, any offense under Federal, State, or tribal law involving crimes of violence; sexual assault,

> molestation, exploitation, contact or prostitution; or crimes against persons.

25 U.S.C. § 3207. We begin by addressing whether section 3207 applies to both current and prospective employees. We reject the administrative judge's finding in the *Delong* case, IAF4, ID4 at 4-5, and Johnson's argument on petition for review, PFRF1, Tab 4 at 3-4, that the statute only covers new appointments. Because subsection (b) states that the minimum standards apply to "individuals appointed to positions described in subsection (a)" and because subsection (a) refers to "each individual who is employed, or is being considered for employment" in a covered position, we find that the minimum standards apply to both current and prospective employees.

Additionally, Johnson argued that the term "crimes against persons" means multiple crimes or acts. *See* PFRF1 at 5. We reject this interpretation because it distorts the plain language of the Act. The statute requires that the minimum standards of character ensure that none of the individuals appointed to covered positions have been found guilty of, or entered a plea of no contest or guilty to, "any *offense* under Federal, State, or tribal law involving crimes of violence; sexual assault, molestation, exploitation, contact or prostitution; or crimes against persons." *25 U.S.C. § 3207*(b) (emphasis added). The key word in this provision is "offense," which is in the singular form. We note that the plural terms, "crimes of violence" and "crimes against persons," refer to a category of crimes that Congress intended to be within the purview of the statute. We find that the term "crimes against persons" describes one type of offense that is actionable under the statute.

We now turn to the main issue of whether the language of section 3207 mandated the removal actions. In subsection (a)(3), Congress authorized the agency to "prescribe by regulations minimum standards of character." By using the word "shall" in subsection (b), it mandated that those standards must "ensure that none of the individuals appointed to [covered] positions . . . have been found guilty of, or entered a plea of nolo contendere or guilty to, . . ." a

covered crime. *25 U.S.C. § 3207*(b). The only way to "ensure" that none of the individuals appointed to a covered position have been "found guilty of, or entered a plea of nolo contendere or guilty to," a covered crime is to make that prohibition the base eligibility requirement for obtaining and/or retaining employment in a covered position. Therefore, under its plain meaning, we find that section 3207(b) requires, as the minimum eligibility standard for holding a covered position ("the minimum standard"), that the individual who is employed, or is being considered for employment, must not have been found guilty of, or entered a plea of nolo contendere or guilty to, a covered crime.

Even though the appellants' argument that the plain language of the statute does not include the words "remove" or "dismiss" is technically correct, we find that two necessary conclusions naturally follow from the plain meaning of subsection 3207(b): (1) if an individual who is being considered for employment does not meet the minimum standard, he cannot be appointed to a covered position; and (2) if an individual who is employed in a covered position fails to meet the minimum standard, he cannot continue to be appointed to that position. If a character investigation discloses that an individual has violated the minimum standard, removal from the covered position is required under the language of the statute because that is the only way to "ensure" that "none of the individuals appointed to [covered] positions . . . have been found guilty of, or entered a plea of nolo contendere or guilty to," a covered crime. Neither the appellants nor the administrative judges indicated how the statutory mandate could otherwise be satisfied.

Our interpretation of section 3207 is supported by section 3201 of the Act. Section 3201(a) provides, in pertinent part, that, after holding hearings on the problem of child abuse on Indian reservations, Congress found that multiple incidents of sexual abuse of Indian children had been perpetrated by Federal employees and that Federal background investigations of Federal employees who care for Indian children had been deficient. *25 U.S.C. § 3201*(a)(1)(C) and (D). The language and history of the Act show that Congress intended to afford the maximum

protection for Indian children and that there were concerns about incidents where Federal employees had abused them.

We find that the statute's purpose is clearly protective, rather than punitive. In section 3201(a)(2)(A), Congress declared that one of its major goals is to identify the scope of incidents of abuse of Indian children and "*to reduce such incidents.*" *25 U.S.C. § 3201*(a)(2)(A) (emphasis added). The Act identifies a narrow category of individuals, those who have been convicted of or pled no contest or guilty to, a covered crime, and ensures that those individuals do not hold positions within the agency where their duties will involve contact with or control over Indian children. This serves the overall goals of the Act, to prevent child abuse, and protect Indian children. Additionally, we note that one of the stated purposes of the Act is to "authorize *such other actions as are necessary to ensure effective child protection* in Indian country" and on Indian reservations. *25 U.S.C. § 3201*(b)(3) and (9) (emphasis added). Given this Congressional statement, we find no valid basis in the appellants' argument for prohibiting new appointments while not terminating the appointments of those holding covered positions who have been found guilty of, or entered a plea of no contest or guilty to, a covered crime. In order to enforce the minimum standard under section 3207(b), we find that, if a character investigation reveals that an individual who holds a covered position has violated the minimum standard, removal from that position is a necessary action to ensure effective Indian child protection and to reduce incidents of Indian child abuse perpetrated by Federal employees.

Here, it is undisputed that the appellants held covered positions and that they each violated the minimum standard of character by either being convicted of, or pleading guilty or no contest to a crime that is classified as a crime against persons. We find that the agency properly removed the appellants from their positions as required by the plain language of the statute.

There is a nexus between the conduct and promotion of the efficiency of service.

The nexus limitation imposed by *5 U.S.C. § 7513*(a), requires an agency to show by preponderant evidence "the necessary connection between the employee's off duty misconduct and the employee's job-related responsibilities." *White v. U.S. Postal Service, 768 F.2d 334, 335-36 (Fed. Cir. 1985)*. Nexus may be shown in one of three ways: (1) a rebuttable presumption of nexus that may arise in certain egregious circumstances based on the nature and gravity of the conduct; (2) a showing by preponderant evidence that the conduct affects the employee's or his coworkers' job performance, or management's trust and confidence in the employee's job performance; or (3) a showing by preponderant evidence that the conduct interfered with or adversely affected the agency's mission. *Kruger v. Department of Justice, 32 M.S.P.R. 71, 74 (1987)*.

Here, by enacting the mandatory language of section 3207, we find that Congress created a presumption of nexus between an employee's violation of the minimum standard of character and appointment to or continued service in a covered position. Section 3207 reflects the view of Congress that prohibiting individuals who have been found guilty of, or entered a plea of no contest or guilty to, a covered crime from holding a covered position promotes the efficiency of the agency's service.

Appellants Daugherty and Delong argued that a nexus could not be presumed because the violations of the minimum standard of character occurred more than ten years ago. Further, all of the appellants asserted that it is undisputed that the violations never affected their job performance, or management's trust and confidence in them. Although we acknowledge that the removals were unrelated to the appellants' job performance, nevertheless, because the language of the statute does not limit its coverage to a specific time period, we disagree with their assertion that nexus cannot be presumed. We find that the appellants' claims are insufficient to rebut the presumption of nexus and that the history and purpose of the statute establish the vital connection between the appellants' off duty conduct and the efficiency of the service.

We also reject the appellants' claims that the penalty of removal is unreasonable and that it should be mitigated. The Board has held that it has authority to reduce the penalty imposed by an agency if certain mitigating circumstances exist. *Douglas v. Department of Veterans Affairs, 5 M.S.P.R. 280 (1981).* However, in the circumstances of these cases, the plain meaning of section 3207 prohibits individuals from holding an appointment to a covered position if they have been found guilty of, or entered a plea of no contest or guilty to, a covered crime. Further, the agency showed that there were no other positions to which the appellants could have been reassigned, given the number of its positions that involve contact with Indian children. *See* IAF1, Tab 12, Subtabs 4A, 4C; IAF2, Tab 6, Subtab E and Tab 13, Subtabs 1A, 4F, 4G; IAF3, Tab 7, Subtabs 1A, 4E; IAF4, Tab 6, Subtabs 4B, 4H. Accordingly, we find that the agency was justified in removing them, and we sustain the removal actions.

ORDER

This is the final decision of the Merit Systems Protection Board in these appeals. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO APPELLANTS JOHNSON AND DAUGHERTY REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request further review of this final decision.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review this final decision on your discrimination claims. *See* Title 5 of the United States Code, section 7702(b)(1) *(5 U.S.C. § 7702* (b)(1)). You must send your request to EEOC at the following address:

Equal Employment Opportunity Commission Office of Federal Operations
P.O. Box 19848
Washington, DC 20036

You should send your request to EEOC no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with EEOC no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time.

Discrimination and Other Claims: Judicial Action

If you do not request EEOC to review this final decision on your discrimination claims, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. *See 5 U.S.C. § 7703*(b)(2). You must file your civil action with the district court no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the district court no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See 42 U.S.C. § 2000e*5(f); *29 U.S.C. § 794a.*

Other Claims: Judicial Review

If you do not want to request review of this final decision concerning your discrimination claims, but you do want to request review of the Board's decision without regard to your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review this final decision on the other issues in your appeal. You must submit your request to the court at the following address:

United States Court of Appeals for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management, 931 F.2d 1544 (Fed. Cir. 1991).*

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in *5 U.S.C. § 7703.* You may read this law as well as review other related material at our web site, http://www.mspb.gov.

NOTICE TO APPELLANTS CASE AND DELONG REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management, 931 F.2d 1544 (Fed. Cir. 1991).*

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 *(5 U.S.C. § 7703)*. You may read this law as well as review other related material at our web site, http://www.mspb.gov.

FOR THE BOARD:

Robert E. Taylor

Clerk of the Board

Washington, D.C.

Footnotes

[1] This is a class I misdemeanor, and it is classified as a crime against persons by the State of Nebraska. Neb. Rev. St. § 28-311.01. IAF1, Tab 12, Subtab 4H.

[2] Both Case and Daugherty failed to disclose these convictions on their employment applications. The administrative judge did not sustain these charges. Because the agency has not raised the issue and based on our findings in this Opinion and Order, it is not necessary for us to analyze whether the falsification charges were sustainable.

[3] While the administrative judge in the Delong case did not cite to the regulations, he applied similar factors in determining that the charge was not sustainable. ID4 at 6.

[4] Although the agency in these appeals had issued proposed regulations in accordance with the Act, they were not final at the time of the appellants' removals. Therefore, after finding that the statute was silent as to whether the agency had discretion to consider mitigating circumstances in connection with covered crimes, the administrative judges looked to the regulations issued by the BIA for guidance. The BIA regulations, found at 25 C.F.R. § 63.19, were promulgated under *25 U.S.C. § 3207*(a)(3). The regulations provided that the employer "*may* deny employment or

dismiss an employee when an individual has been found guilty of or entered a plea of guilty or nolo contendere to any Federal, state, or tribal offense involving crimes against persons." 25 C.F.R. § 63.19(a) (emphasis added). On November 30, 1999, the BIA regulations were amended to change "may" to "must." *64 Fed. Reg. 66,771 (1999).* Again, because of our analysis, it is not necessary to address either agencies' regulations or the BIA amendments.

[6] We note that Daugherty labeled his filing as a "cross petition for review"; however, because it asks us to sustain the initial decision and raises no additional issues, it constitutes his response to the agency's petition for review.

Docket Number DE-0752-99-0299-I-1

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
DENVER FIELD OFFICE

LOIS DELONG,
Appellant,

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES,
Agency.

DATE: December 13, 1999

John Fredericks, Esquire, Fredericks, Pelcyger & Hester, L.L.C., Louisville, Colorado, for the appellant.

Leslie Stafford, Esquire, and T. Sue Duran, Dallas, Texas, for the agency.

BEFORE
Jack E. Salyer
Administrative Judge

INITIAL DECISION

The appellant timely appealed to the Merit Systems Protection Board (the Board) from the action of the agency, the Indian Health Service (IHS), removing her from the position of Substance Abuse Specialist, Acoma-Canoncito-Laguna (ACL) Service Unit, IHS, San Fidel, New Mexico, effective June 4, 1999. The appellant has appeal rights to the Board from the agency's action under 5 U.S.C. §§ 7511(a)(1)(A), 7512(1), 7513(d), and 7701(a).

For the reasons outlined below, I REVERSE the appellant's removal.

ANALYSIS AND FINDINGS

Background

The following salient facts are undisputed unless otherwise stated. At all pertinent times, the appellant was employed as a Substance Abuse Specialist, Acoma-Canoncito-Laguna (ACL) Service Unit, IHS, San Fidel, New Mexico. The appellant has approximately 10 years of Federal service.

In 1974, the appellant, an Indian, and a college student at the University of South Dakota, was convicted in the South Dakota state courts of assault and battery. The appellant's conviction stemmed from criminal charges arising out of a campus fight between Indian and non-Indian students. The appellant was sentenced to jail for 25 days and paid a fine of $200. The appellant has had no further involvement with the criminal justice process. On March 23, 1999, the results of a background investigation by the Office of Federal Investigations of the Office of Personnel Management (OPM) were received by the agency. The investigative report included the appellant's nearly 25-year-old conviction.

On April 19, 1999, Patricia L. Tomhave, Director, Division of Personnel Management, Albuquerque Area Indian Health Service, proposed the appellant's removal based on her alleged loss of her eligibility to perform the duties of her position based on the Indian Child Protection and Family Violence Prevention Act, Public Law (P.L.) 101-630. The appellant responded to the proposed removal in writing. On May 27, 1999, Captain (CPT) Richie Grinnell, Acting Executive Officer, Albuquerque Area Indian Health Service, issued a decision effecting the appellant's removal on June 4, 1999. The appellant subsequently filed the present appeal. Because the appellant freely and unequivocally withdrew her hearing request, this decision is based on the parties' written submissions. See generally Appeal File.

Burdens of proof

As to the merits of the appeal, the agency must prove the facts of the misconduct charge by a preponderance of the evidence. 5 U.S.C. § 7701(c)(1)(B); 5 C.F.R. § 1201.56(a)(1)(ii). Preponderance of the evidence is defined by Board regulation as that degree of relevant evidence which a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than not true. 5 C.F.R. § 1201.56(c)(2). If the agency proves the misconduct charge, it must additionally demonstrate that disciplinary action is warranted for the sustained charge and that the penalty selected is within tolerable limits of reasonableness. See Douglas v. Veterans Administration, 5 M.S.P.R. 280, 305-06 (1981).

The agency has failed to prove by a preponderance of the evidence that the appellant has lost her eligibility to perform the duties of her position.

The agency proposed and effected the appellant's removal because of her alleged loss of eligibility to perform the duties of her position under the Indian Child Protection and Family Violence Prevention Act. Appeal File, Tabs 6(4g) and (4b). The agency's position, simply put, is that the foregoing Act somehow mandates the removal of any employee, such as the appellant, who has been convicted of assault. However, for the following reasons, I find that the applicable statutory provisions do not per se require removal of current employees convicted of assault or any other offenses for that matter.

The pertinent provisions of the Indian Child Protection and Family Violence Prevention Act are as follows: The Secretary of the Interior and the Secretary of Health and Human Services are required to:

> (1) compile a list of all authorized positions within their respective departments the duties and responsibilities of which involve regular contact with, or control over, Indian children,
>
> (2) conduct an investigation of the character of each individual who is employed or is being considered for employment, by the respective Secretary in a position listed pursuant to paragraph (1), and
>
> (3) prescribe by regulations minimum standards of character that each of such individuals must meet to be appointed to such positions.

25 U.S.C. § 3207(a). The Act also provides:

> The minimum standards of character that are to be prescribed under this section shall ensure that none of the individuals appointed to positions described in subsection (a) of this section have been found guilty of, or entered a plea of nolo contendre or guilty to, any offense under Federal, State, or tribal law involving crimes of violence; sexual assault, molestation, exploitation, contact, or prostitution; or crimes against persons.

25 U.S.C. § 3207(b).

First, I find that it is undisputed that the appellant's Substance Abuse Specialist position is a "covered position" under the Act. It is also undisputed that the appellant was convicted of a criminal offense covered by the Act.

However, I have carefully read and reread the foregoing statutory provisions and find no language contained therein which expressly requires the agency to remove current Federal employees who, like the appellant, have been

convicted of assault or any other offenses. Furthermore, there is no language in the Act which prohibits agency deciding officials from considering extenuating and mitigating circumstances in weighing the appropriateness of a disciplinary penalty.[1] 25 U.S.C. §§ 3207(a) and (b). Conversely, I find that, in the Act, there is express statutory language which clearly bars new appointments to covered positions of individuals who have a criminal record consisting of certain specified offenses. 25 U.S.C. §§ 3207(a) and (b). Under the circumstances, I find that Congress intended to bar new appointments of individuals convicted of certain offenses against persons.[2] I also find that, if Congress had intended that all current Federal employees possessing convictions for such offenses were to be removed, it would undoubtedly have enacted legislation stating just that. That Congress did not pass such sweeping legislation is, I find, compelling evidence that it did not intend that all current Federal employees who have ever been convicted of any of the specified offenses must be removed. See Hargrove v. Department of Defense, 77 M.S.P.R. 266, 270 (1998).

I therefore find that the agency has erred in promulgating regulations and policies which, in the absence of clear Congressional intent, provide for a per se policy of removal of current Federal employees who have been convicted of covered offenses and do not allow deciding officials to independently weigh the appropriateness of the penalties to be assessed. See Chevron, U.S.A., Inc., v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 (1983); see Diehl v. Office of Personnel Management, 50 M.S.P.R. 519, 522 (1991).

I further find that the agency erred in applying its per se removal rule to the appellant, a current employee with a single assault conviction in the distant past. Furthermore, relying as the agency did on its per se rule, it has presented no evidence whatsoever concerning the appellant's actual suitability or eligibility to work with Indian children. I find that the agency's failure to present such evidence is most likely attributable to the fact that there is none. Therefore, I find that the agency's charge or reason for removing the

appellant, i.e., that, pursuant to the Act, she is ineligible for continued employment with the agency, cannot be sustained. Even if the agency's charge had been sustained, no disciplinary action would be for such cause as would promote the efficiency of the service.

The agency's adverse action must be "for such cause as will promote the efficiency of the service." 5 U.S.C. § 7513(a). For the following reasons, I find that taking any disciplinary action against the appellant based on the sustained charge does not promote the efficiency of the service. 5 U.S.C. § 7513(a).

The agency nowhere specifically argues that the Board lacks the authority to review the propriety of the penalty accorded the appellant. See generally Appeal File. Furthermore, as noted above, there is no language in the Act which bars such review. Therefore, I find that the Board has the authority in the instant appeal, as it does in any adverse action appeal, to review the propriety of the penalty in the light of all the facts and circumstances. See LaChance v. Devall, 178 F.3d 1246, 1251 (Fed. Cir. 1999).[3]

Nearly 25 years ago, when the appellant was quite young and likely immature, she became involved in a campus fight between Indians and non-Indians. The appellant's conviction resulted from an assault charge which arose from this fight not from overt criminal activity. Thus, I find that the nature of the appellant's criminal conduct, out of which the criminal charges arose and for which she was sentenced, to be a significant mitigating factor. Furthermore, the appellant served her minimal criminal sentence and, since then, has had no involvement with the criminal justice process. Therefore, I find that the record demonstrates that the appellant is fully rehabilitated.

Furthermore, although neither party has presented any penalty evidence, I find that it can be presumed that the appellant's performance and conduct in her position of Substance Abuse Specialist were at least acceptable or better.

I also find that the agency has produced no evidence whatsoever that, because of a criminal conviction for assault which occurred almost 25 years ago, the appellant is presently ineligible to encumber a position in which she regularly deals with Indian children. Moreover, that the appellant has been doing so for approximately 10 years without incident demonstrates that she is hardly a threat or a danger to Indian children. Furthermore, I find no nexus or connection between a single assault conviction now nearly 25 years old that stemmed from a campus fight and the Act's certainly laudable purpose of protecting Indian children from physical and sexual abuse.

Accordingly, I find that, even assuming arguendo that the Act is somehow applicable to the appellant's factual situation, no disciplinary penalty at all would be appropriate for her now nearly 25-year-old single criminal conviction for assault. Under the circumstances, I find that the imposition of any discipline at all on the appellant would be an egregious abuse of the agency's authority to discipline its employees. See LaChance, 178 F.3d at 1251.[4]

DECISION

The agency's action is REVERSED.

ORDER

The agency is ORDERED to cancel the removal and to retroactively restore the appellant effective June 4, 1999. This action must be accomplished no later than 20 calendar days after the date this initial decision becomes final.

The agency is also ORDERED to issue a check to the appellant for the appropriate amount of back pay, with interest and benefits, in accordance with the Office of Personnel Management's regulations, no later than 60 calendar days after the date this initial decision becomes final. The appellant is ORDERED to cooperate in good faith with the agency's efforts to compute the amount of back pay

and benefits due and to provide all necessary information requested by the agency to help it comply.

If there is a dispute about the amount of back pay due, the agency is ORDERED to issue a check to the appellant for the undisputed amount no later than 60 calendar days after the date this initial decision becomes final. The appellant may then file a petition for enforcement with this office to resolve the disputed amount.

The agency is further ORDERED to inform the appellant in writing of all actions taken to comply with the Board's Order and the date on which it believes it has fully complied. If not notified, the appellant should ask the agency about its efforts to comply.

INTERIM RELIEF

If a petition for review is filed, I ORDER the agency to provide interim relief to the appellant in accordance with 5 U.S.C. § 7701(b)(2)(A). The relief shall be effective upon the issuance of this decision and will remain in effect until the decision of the Board becomes final. If an agency files a petition or cross petition for review and fails to submit evidence that it has complied with the provisions of 5 C.F.R. § 1201.115(b)(1) or (2), the Board may dismiss the agency's petition for review. If the agency does not return the appellant to his former position, duties, and tour of duty at his former duty station, it must justify its failure to do so by making an "undue disruption determination" in accordance with 5 U.S.C. § 7701(b)(2)(A). Such a determination must be communicated to the appellant in writing no later than the deadline for filing a petition for review. The agency must include with its petition for review evidence that such a determination has been duly made and communicated to the appellant or its petition may be dismissed.

FOR THE BOARD:
Jack E. Salyer
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on January 17, 2000, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is the last day on which you can file a petition for review with the Board. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition for review must state your objections to the initial decision, supported by references to applicable laws, regulations, and the record. You must file your petition with:

The Clerk of the Board
Merit Systems Protection Board
1120 Vermont Avenue, NW., Room 806
Washington, DC 20419

If you file a petition for review, the Board will obtain the record in your case from the Administrative Judge and you should not submit anything to the Board that is already part of the record. Your petition must be postmarked or hand-delivered no later than the date this initial decision becomes final. If you fail to provide a statement with your petition that you have either mailed or hand-delivered a copy of your petition to the agency, your petition will be rejected and returned to you.

JUDICIAL REVIEW

If you are dissatisfied with the Board's final decision, you may file a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, NW.
Washington, DC 20439

You may not file your petition with the court before this decision becomes final. To be timely, your petition must be received by the court no later than 30 calendar days after the date this initial decision becomes final.

ATTORNEY FEES

If no petition for review is filed, you may ask for the payment of attorney fees and costs by filing a motion with this office as soon as possible, but no later than 60 calendar days after the date this initial decision becomes final. Any such motion must be prepared in accordance with the provisions of 5 C.F.R. Part 1201, Subpart H, and applicable case law.

ENFORCEMENT

If, after the agency has informed you that it has fully complied with this decision, you believe that there has not been full compliance, you may ask the Board to enforce its decision by filing a motion with this office no later than 30 calendar days after the date of the agency's notification of compliance.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

Footnotes

[1] I also find that there is no language in the Act which prohibits the Board from addressing the propriety of the penalty accorded the appellant. See analysis, infra.

[2] Thus, I find that the Act certainly can be construed as suitability legislation which is solely prospective in nature. I also find that there is an easily-drawn distinction to be made between mere applicants for positions and current employees who possess tenure and status.

[3] This is in stark contrast to the clarity of 31 U.S.C. § 1349(b) which requires a minimum penalty of a 30-day suspension for willful misuse of a government vehicle and which the Board has long recognized as binding upon its penalty analysis.

[4] In view of the foregoing findings, I need not address the appellant's claim that it was improper for the agency to apply the Act to her retroactively.

00-3449

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

LOIS DELONG,
Petitioner,

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES,
Respondent.

December 21, 2001, Decided

December 21, 2001, Filed

OPINION:

ORDER

A combined petition for panel rehearing and for rehearing en banc having been filed by the PETITIONER, and a response thereto having been invited by the court and filed by the RESPONDENT, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc and response having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for panel rehearing be, and the same hereby is, DENIED and is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on December 28, 2001.

Dated: December 21, 2001

MAY 28 2002

No. 01-1410

In the Supreme Court of the United States

LOIS DELONG, PETITIONER

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record

ROBERT D. MCCALLUM, JR.
Assistant Attorney General

DAVID M. COHEN
HAROLD D. LESTER, JR.
ALAN J. LO RE
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

Under the Indian Child Protection and Family Violence Prevention Act of 1990 (Act), 25 U.S.C. 3207, as in effect at the pertinent time, the Secretary of Health and Human Services (Secretary) was required to conduct an investigation into the character of every individual employed by the federal government in any position involving regular contact with Indian children, and was required to ensure that no individual appointed to any such position had been found guilty of certain enumerated crimes, including crimes of violence. The Secretary determined that petitioner had been convicted in 1974 of assault and battery and, pursuant to Section 3207, removed petitioner from her federal position. The questions presented are:

1. Whether 25 U.S.C. 3207 requires the removal of a federal employee who was convicted of one of the enumerated crimes before the Act was enacted into law.

2. Whether petitioner's removal from her federal employment pursuant to 25 U.S.C. 3207 violated her due process rights.

3. Whether 25 U.S.C. 3207 is an unconstitutional bill of attainder or ex post facto law.

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In the Supreme Court of the United States

No. 01-1410

LOIS DELONG, PETITIONER

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 264 F.3d 1334. The final decision of the Merit Systems Protection Board (Pet. App. 15a-29a) is reported at 86 M.S.P.R. 501. The initial decision of the administrative judge (Pet. App. 30a-40a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 5, 2001. A petition for rehearing was denied on December 21, 2001. Pet. App. 41a. The petition for a writ of certiorari was filed on March 21, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under the Indian Child Protection and Family Violence Prevention Act of 1990 (Act), 25 U.S.C. 3207, the Secretary of Health and Human Services (Secretary) must "conduct an investigation of the character of each individual who is employed, or being considered for employment," in any position with "duties and responsibilities * * * which involve regular contact with, or control over, Indian children." 25 U.S.C. 3207(a)(1) and (2). The Act further provides that the Secretary must prescribe minimum standards that such individuals must meet to be appointed to such positions. 25 U.S.C. 3207(a)(3). At the pertinent time, the Act required those minimum standards to ensure that no individuals appointed to such positions "have been found guilty of" any of certain enumerated offenses, including any crime of violence. 25 U.S.C. 3207(b).[1]

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[1] On December 27, 2000, Congress amended the Indian Child Protection and Family Violence Prevention Act. As amended, the Act now requires the Secretary to prescribe minimum standards ensuring that no individual appointed to a position with responsibilities involving regular contact with Indian children shall have been found guilty of "any felonious offense, or any of two [*sic*] or more misdemeanor offenses" falling into certain classifications, including crimes of violence. See Native American Laws Technical Corrections Act of 2000, Pub. L. No. 106-568, Tit. VIII, § 814(1), 114 Stat. 2918.

These amendments to the Act were enacted while this case was pending before the court of appeals, before the court issued its decision. After the court issued that decision, petitioner argued for the first time in her petition for rehearing that the 2000 amendments rendered the Act inapplicable to her because (she contended) her 1974 conviction was a misdemeanor, and she had not been convicted of any other disqualifying offense. At the time that the Secretary made the decision to remove petitioner from federal employment, however, the law in effect required the Secretary to

2. This case involves the Secretary's action to remove petitioner from her position with the Department of Health and Human Services (Department or HHS) because, under the Act, petitioner's previous conviction for assault and battery rendered her ineligible for employment in that position. Petitioner was employed by HHS as a substance abuse specialist. Her responsibilities included regular and unsupervised contact with Indian children and adolescents receiving treatment for chemical dependency. Pet. App. 2a. On April 19, 1999, HHS issued a notice of proposed action to remove petitioner from her position because, in 1974, she had been convicted of assault and battery. In response, petitioner submitted a letter from her legal representative as well as several letters indicating that, despite her conviction, her job performance had been satisfactory. Despite that submission, HHS determined that Section 3207 rendered petitioner ineligible for continued employment in her position as a substance abuse specialist. *Ibid.* HHS was unable to find any

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remove from employment any person who had been previously convicted of any single crime involving violence, whether the crime was a felony or misdemeanor. Because, as we explain in this brief, the Secretary's removal of petitioner was proper at the time that action was undertaken, the 2000 amendments could not be applied to petitioner's case without a determination that Congress had intended those amendments to be applied retroactively to invalidate the previously lawful removal of a federal employee. Cf. *Landgraf* v. *USI Film Prods.*, 511 U.S. 244 (1994). The language of the 2000 amendments nowhere suggests that Congress intended the new law to be applied retroactively. If, however, petitioner is correct in her assertion that her 1974 offense was a misdemeanor, and if she has not been found guilty of any other offenses, there is nothing in the language of the current version of Section 3207 that would preclude her from future employment in a federal government position involving contact with Indian children.

other position for petitioner that did not involve contact with Indian children. *Id.* at 14a n.2. Accordingly, HHS removed petitioner from her position effective June 4, 1999. *Id.* at 2a.

3. Petitioner appealed her removal to the Merit Systems Protection Board (MSPB or Board). An administrative judge (AJ) of the Board initially ruled that Section 3207 did not mandate petitioner's removal from federal employment, but rather, permitted HHS to consider extenuating and mitigating circumstances. Pet. App. 33a-34a. The AJ held further that, because HHS had failed to consider such circumstances in petitioner's case, and had also not considered her actual suitability for work with Indian children, her removal should not be sustained. *Id.* at 34a-35a. The AJ also held (*id.* at 35a) that, because petitioner's conviction was 25 years old and stemmed from a college campus fight between Indian and non-Indian students, HHS had failed to demonstrate that her removal "promoted the efficiency of the service," as required by 5 U.S.C. 7513(a). Accordingly, the AJ reversed the Department's removal of petitioner. Pet. App. 36a.

4. The Department petitioned for review of the AJ's decision before the full MSPB, which granted review and sustained the Department's decision to remove petitioner. Pet. App. 15a-29a.[2] The full Board concluded that Section 3207 requires the removal from a

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[2] The full Board consolidated petitioner's case with three others raising the same and related issues. See Pet. App. 16a. In one of the other cases, the employee separately petitioned for review of the Board's decision and raised issues similar to those raised by petitioner here. The Federal Circuit affirmed the Board in an unpublished decision, and this Court denied certiorari. See *Johnson* v. *HHS*, 18 Fed. Appx. 837 (Fed. Cir.), cert. denied, 122 S. Ct. 354 (2001).

position involving contact with Indian children of any individual who has been convicted at any time of one of the enumerated offenses, and that the Act does not provide for consideration of extenuating or mitigating factors. See *id.* at 21a-22a. The Board also concluded that, because the Act itself defines a nexus between an employee's failure to meet the Act's specified minimum standards of character and the employee's unsuitability for continued service in a position covered by the Act, the removal of an employee covered by Section 3207 promotes the efficiency of the service, as required by 5 U.S.C. 7513(a). See Pet. App 24a.

5. Petitioner petitioned for review of the Board's final decision in the United States Court of Appeals for the Federal Circuit. The court affirmed the Board's decision. Pet. App. 1a-14a.

a. The court first rejected petitioner's contention that Section 3207 does not apply to individuals who were already federal employees at time of the Act's passage. Pet. App. 6a-9a. Section 3207(b) requires the Secretary to ensure that "none of the individuals *appointed* to positions" involving contact with Indian children shall have been found guilty of various crimes. See 25 U.S.C. 3207(b) (emphasis added). Petitioner had argued that the Act's use of the term "appointed" confined its scope to individuals considered for appointment after passage of the Act. The court observed, however, that "current employees also may be considered to 'be appointed' [*sic*] to their positions." Pet. App. 7a.

The court also noted that Section 3207(b)'s use of the past tense to refer to individuals who "have been found guilty of" an enumerated crime "clearly requires HHS to consider crimes committed prior to enactment of the Act when determining whether an employee satisfies

the minimum standards of character." Pet. App. 8a. Moreover, the court stated, Congress's statutory finding that "multiple incidents of sexual abuse of children on Indian reservations have been * * * perpetrated by persons employed * * * by the Federal government," 25 U.S.C. 3201(a)(1)(C), reflected Congress's concern that "current federal employees may pose a threat to Indian children." Pet. App. 8a. The court also found no language in the Act to suggest that HHS would be authorized, on the basis of mitigating circumstances, to permit an employee who had been found guilty of one of the specified crimes to remain in federal employment in a position covered by the Act. See *ibid.*

b. The court rejected petitioner's contention that the application of Section 3207 to require her removal violates the Due Process Clause because it operates as an "irrebuttable presumption" to the effect that her conviction renders her unfit for federal service in any position involving Indian children. See Pet. App. 9a-13a. The court stressed that, in *Weinberger* v. *Salfi*, 422 U.S. 749, 772 (1975), this Court held that a conclusive presumption that does not abridge a fundamental right nor discriminate against a suspect class will be upheld if it "bears * * * [a] rational relation to a legitimate legislative goal." Applying that standard, the court concluded that Section 3207 does not violate petitioner's due process rights because "Congress could rationally have concluded that the minimum standards of character in § 3207 would reduce the incidence of abuse of Indian children at the hands of federal employees." Pet. App. 13a. The court also observed that, "given the difficulty of identifying employees who pose a threat to Indian children, the choice of a blanket rule is justified in this case." *Ibid.*

ARGUMENT

The court of appeals' decision, sustaining the application of Section 3207 to require petitioner's removal from covered federal employment, is correct. That decision also does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. Petitioner argues (Pet. 23-26) that the application of Section 3207 to require her removal from covered federal employment is contrary to the presumption against retroactive application of federal statutes articulated in *Landgraf* v. *USI Film Products*, 511 U.S. 244 (1994). The court of appeals correctly concluded, however, that Section 3207 requires the removal of federal employees who were employed in covered positions at the time the Act was passed, even if their convictions predated passage of the Act.

Section 3207(a)(2) requires the Secretary to "conduct an investigation of the character of each individual who *is employed*, or is being considered for employment," in a position with responsibilities involving regular contact with Indian children. 25 U.S.C. 3207(a) (emphasis added). The Act's specific reference to any individual who is employed, *as well as* to any individual who is considered for employment in the future, makes clear that Congress intended the law to cover employees already employed by the federal government at the time of the Act's passage. In addition, Section 3207(b) expressly requires the Secretary to ensure that no individuals appointed to such positions "have been" found guilty of any offense involving, among other things, crimes of violence. 25 U.S.C. 3207(b). Congress's use of the past tense indicates that it intended to reach current employees who had previously been

found guilty of disqualifying offenses. Thus, Congress has expressly prescribed the Act's temporal reach, see *Landgraf*, 511 U.S. at 270, and has required the removal of current employees who were previously found guilty of covered offenses.

Petitioner argues that the Court should reject a "retroactive application" of Section 3207 in order to avoid "serious constitutional problems." Pet. 23-24. In the first place, the statute does not apply retroactively in any meaningful sense. The Act simply limits the prospective employment of certain individuals from the date of enactment forward. Second, as we explain below (pp. 8-11, 13-16, *infra*), the application of Section 3207 to petitioner does not raise any serious constitutional concerns. Finally, the canon of construction invoked by petitioner applies only where there is a genuine ambiguity in the statute, such that one of at least two permissible constructions of the law will avoid the allegedly unconstitutional reading. See *Pennsylvania Dep't of Corrs.* v. *Yeskey*, 524 U.S. 206, 211 (1998). In this case, the Act unambiguously applies to petitioner, and there is no permissible reading of Section 3207 that would avoid that application.

2. Petitioner principally argues (Pet. 6-17) that Section 3207 impermissibly operates on the basis of an "irrebuttable presumption" that she is unfit for employment with Indian children, merely because she was convicted of assault and battery at some previous time. Petitioner relies heavily on this Court's decisions in *Stanley* v. *Illinois*, 405 U.S. 645 (1972), and *Vlandis* v. *Kline*, 412 U.S. 441 (1973). See Pet. 10-13. But as the court of appeals properly recognized (Pet. App. 9a-11a), those decisions must be read in light of this Court's later decision in *Weinberger* v. *Salfi*, 422 U.S. 749, 767-785 (1975), which reexamined the "irrebuttable pre-

sumption" doctrine and made clear that, absent a suspect classification or an effect on fundamental rights, a legislative presumption must be upheld if it satisfies rational-basis review. The court of appeals properly analyzed and upheld Section 3207 in accordance with that standard.

In *Salfi*, the Court upheld a provision of the Social Security Act that conclusively presumed that marriages that did not take place at least nine months before the death of the beneficiary were entered into for the purpose of securing social security benefits for the surviving spouse, and on that basis denied benefits to a surviving spouse whose marriage had not preceded the wage earner's death by at least nine months. 422 U.S. at 767-768. After examining *Stanley* and *Vlandis*,[3] the Court explained in *Salfi* that an extravagant extension of those decisions could turn them into "a virtual engine of destruction for countless legislative judgments which have heretofore been thought wholly consistent with the Fifth and Fourteenth Amendments to the Constitution." *Id.* at 772. Accordingly, the Court made clear, where a presumption does not implicate a "constitutionally protected status" or important personal liberties, it need only bear a rational relation to a legitimate legislative goal. See *ibid.*

Section 3207 readily satisfies that standard, as the court of appeals concluded. Federal employment does

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[3] In *Stanley*, the Court struck down a statute that denied a hearing on parental fitness to an unwed father, even though such a hearing was granted to all other parents whose custody of their children was challenged. See 405 U.S. at 651. In *Vlandis*, the Court struck down a state statute that defined "resident" for purposes of determining state university tuition but denied those seeking to show residency the opportunity to present factors clearly bearing upon the issue of residency. See 412 U.S. at 452.

not implicate a fundamental right such as the right to raise one's children at issue in *Stanley*, and Section 3207 does not operate on the basis of any suspect classification. The only question, therefore, is whether the minimum standards of character articulated in Section 3207, identifying convictions for certain classes of offenses as rendering the individual unsuitable for employment in a position with responsibilities involving Indian children, is rationally related to the government's interest in protecting Indian children from abuse. Pet. App. 12a-13a. It was not irrational for Congress to conclude that the protection of a particularly vulnerable population of children warranted exclusion from employment of all persons previously convicted of crimes involving violence, even if those persons might be able to show in their individual cases that they had been rehabilitated. Although Congress might have taken a different approach, "Congress can rationally conclude not only that generalized rules are appropriate to its purposes and concerns, but also that the difficulties of individual determinations outweigh the marginal increments in the precise effectuation of congressional concern which they might be expected to produce." *Salfi*, 422 U.S. at 785.

Petitioner also relies on *Bell* v. *Burson*, 402 U.S. 535 (1971), to argue that Section 3207 deprives her of due process. The due process concerns expressed by the Court in *Bell*, however, are remote from this case. *Bell* involved a legislative scheme under which an uninsured motorist involved in an accident was required to post security to cover the amount of damages being claimed against him, or suffer suspension of his driver's license. The State refused to allow the motorist to present evidence concerning his fault in the accident or the likelihood that he would not be found liable in damages

in order to avoid or mitigate the obligation to post security. This Court ruled that the State's refusal to entertain such evidence violated procedural due process. In so ruling, the Court emphasized that the driver's fault in the accident was relevant to the ultimate question (to be determined in a later adjudication) whether the driver was liable in damages for an injury caused by the accident (and whether his license would be suspended as a result). Because it was "clear that liability, in the sense of an ultimate judicial determination of responsibility, play[ed] a crucial role in the" statutory scheme, the Court determined that the State could not prevent the driver from presenting evidence going to that central issue. *Id.* at 541. Under Section 3207, by contrast, there is no ultimate issue of the employee's "fault" to be resolved through adjudication to establish whether the employee is suitable for federal employment involving Indian children. Rather, Section 3207 itself reflects a congressional policy determination that individuals who have been found guilty of certain classes of crimes may not be appointed to such positions.

3. Petitioner argues (Pet. 6-10) that the decision below conflicts with decisions of other lower courts, namely, *Peterson* v. *Department of Health & Human Services*, No. A98-0264-CV (D. Alaska Sept. 27, 2000); *Fewquay* v. *Page*, 682 F. Supp. 1195 (S.D. Fla. 1987), aff'd, 896 F.2d 558 (11th Cir. 1990) (Table); and *Commonwealth* v. *Clayton*, 684 A.2d 1060 (Pa. 1996). Only *Peterson*, however, involved Section 3207. In that case, a district court invoked the "irrebuttable presumption" concept to rule that the application of Section 3207 to require the employee's removal in that particular case

violated the Due Process Clause.[4] For the reasons we have given, the district court's reliance on "irrebuttable presumption" reasoning was erroneous. The district court's unreviewed decision in *Peterson*, however, does not constitute a conflict among the courts of appeals that would warrant this Court's review under the Court's Rule 10(a).[5]

Fewquay involved a Florida statute similar to Section 3207, which precluded any person who had been found guilty of felony bank robbery from employment in any state program providing care to children. See 682 F. Supp. at 1197. The district court invalidated the state statute, relying on *Stanley* and *Vlandis*. See *id.* at 1198. The Eleventh Circuit affirmed the district court's decision without issuing a published decision of

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[4] For the convenience of the Court, we have lodged a copy of the district court's decision, as well as its order on the government's motion for reconsideration, in *Peterson*. The district court's order on reconsideration clarified that it had not intended to hold Section 3207 unconstitutional. In light of that clarification, the government did not seek further review of that decision.

[5] The only other court of appeals decision that has examined similar issues under Section 3207 has reached a result consistent with the decision below. In *Bear Robe* v. *Parker*, 270 F.3d 1192 (8th Cir. 2001), the court of appeals upheld the dismissal under Section 3207 of an employee of an entity that received federal funding. In that case, the employee had been convicted in 1975, at age 20, of voluntary manslaughter, and his conviction had been set aside pursuant to the Federal Youth Correction Act, 18 U.S.C. 5005-5026 (1982) (repealed 1984). Nonetheless, the court of appeals ruled that the employee's conviction barred him from employment involving contact with Indian children, and cited the decision of the court of appeals in this case for the proposition that "Congress has adopted a bright line rule that persons who fall within the Act's proscriptions are not to be employed in positions that involve regular contract with children in federally funded Indian schools." 270 F.3d at 1195.

its own. 896 F.2d 558. That decision by the court of appeals, however, is not binding precedent in the Eleventh Circuit. See 11th Cir. R. 36-2. Accordingly, *Fewquay* also does not establish a conflict in the circuits warranting this Court's review.

In *Clayton*, the Pennsylvania Supreme Court relied on "irrebuttable presumption" decisions (including this Court's decisions in *Stanley* and *Vlandis*, as well as *Bell*) to hold unconstitutional a state statute that required the suspension of a driver's license for one year upon the occurrence of a single epileptic seizure. See 684 A.2d at 1062-1065. That decision does suggest some lingering uncertainty about the continuing validity and scope of an "irrebuttable presumption" doctrine. Nonetheless, the difference in approach between *Clayton* and the decision below does not warrant this Court's review, given the considerably different statutory contexts in which the two cases arose. It would be more appropriate for this Court to consider reexamining this area of the law when and if a significant conflict emerges in the courts of appeals or among state supreme courts in a particular context about the validity or application of the "irrebuttable presumption" rule.

4. Petitioner argues that Section 3207 is an unconstitutional bill of attainder and ex post facto law. Petitioner raised those contentions for the first time in her petition for rehearing in the court of appeals, which did not address them. Because those claims were neither properly presented to, nor passed on by, the court of appeals, they are not properly before this Court. Cf. *Radio Station WOW, Inc.* v. *Johnson*, 326 U.S. 120, 128 (1945); *Wills* v. *Texas*, 511 U.S. 1097 (1994) (O'Connor, J., concurring in denial of certiorari). In any event, the contentions are without merit.

The Ex Post Facto Clause, U.S. Const. Art. I, § 9, Cl. 3, "forbids the application of any new punitive measure to a crime already consummated." *California Dep't of Corrs.* v. *Morales*, 514 U.S. 499, 505 (1995). A prerequisite to any conclusion that a law violates the Ex Post Facto Clause is a determination that the challenged law is in fact "punitive," for the Clause "has been interpreted to pertain exclusively to penal statutes." *Kansas* v. *Hendricks*, 521 U.S. 346, 370 (1997). Section 3207 lacks the hallmarks of a penal statute. The Act's purpose is the protection of Indian children, based on Congress's finding that children on Indian reservations had been abused by federal employees in the past. 25 U.S.C. 3201(a)(1)(C). The Act does not purport to impose additional penal measures on persons who have previously been found guilty of particular crimes. It does not, for example, require additional detention or the imposition of an *in personam* penalty such as a fine. Although the Act does render persons previously found guilty of certain offenses disqualified from specified positions in federal employment involving contact with Indian children, it is no different in that sense from innumerable statutory provisions that exclude persons convicted of certain crimes from sensitive positions in governmental service, and the Act does not disqualify those persons from *all* federal employment.[6]

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[6] Petitioner relies (Pet. 18) on Justice Thomas's concurring opinion in *Eastern Enterprises* v. *Apfel*, 524 U.S. 498 (1998), in which he suggested (*id.* at 538-539) that the Court should reconsider its longstanding jurisprudence that "has considered the *Ex Post Facto* Clause to apply only in the criminal context." The Court has not adopted that suggestion, however, and the lead opinion in *Eastern Enterprises* observed that "the *Ex Post Facto* Clause is directed at the retroactivity of *penal legislation*." *Id.* at 533 (opinion of O'Connor, J.) (emphasis added).

Similarly, petitioner's contention (Pet. 19-23) that Section 3207 is a bill of attainder is without merit. Petitioner relies on cases such as *United States* v. *Brown*, 381 U.S. 437 (1965), and *Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1866), in which the Court invalidated statutory provisions that disqualified a class of persons from certain forms of employment. But as this Court made clear in its later extensive reexamination of the Bill of Attainder Clause, U.S. Const. Art. I, § 9, Cl. 3, those decisions rest in large part on the fact that the burdened class of persons had been "legislatively branded as disloyal." *Nixon* v. *Administrator of Gen. Servs.*, 433 U.S. 425, 474 (1977). No such pejorative label has been affixed to petitioner.

The Court has also made clear that a legislative enactment imposing "new burdens and deprivations" will not violate the Bill of Attainder Clause if the law "reasonably can be said to further nonpunitive legislative purposes." *Nixon*, 433 U.S. at 475-476; see *Selective Serv. Sys.* v. *Minnesota Pub. Int. Res. Group*, 468 U.S. 841, 851-852 (1984). As we have explained, the purpose of Section 3207 is to protect the vulnerable population of Indian children, not to impose additional punitive consequences on persons such as petitioner. Petitioner evidently is of the view that the class of persons disqualified by Section 3207 for employment with Indian children is too broad, but Congress was not constitutionally disabled from taking an arguably somewhat overprotective prophylactic approach in order to ensure that the problem of abuse of Indian children would not recur. At a minium, the reach of Section 3207 is not so broad that it cannot be said to "reasonably * * * further" Congress's indisputably legitimate and nonpunitive goal of protecting Indian children from abuse by federal employees.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

ROBERT D. MCCALLUM, JR.
Assistant Attorney General

DAVID M. COHEN
HAROLD D. LESTER, JR.
ALAN J. LO RE
Attorneys

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